

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR PETITIONER PACIFIC FAR EAST LINE, INC.

IN THE **236**
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA ~~Circuit~~ *United States Court of Appeals*
For the
District of Columbia Circuit

No. 14,007 FILED

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PACIFIC FAR EAST LINE, INC., *Petitioner, Joseph W. Stewart*

v.

CLERK

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD,
MARITIME ADMINISTRATION, and CLARENCE G. MORSE,
MARITIME ADMINISTRATOR, *Respondents,*

MATSON NAVIGATION COMPANY, *Intervener.*

**Petition for Review of Order of the Federal Maritime Board
and Maritime Administration**

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December 11, 1957

QUESTIONS PRESENTED

1. Whether the majority of the Federal Maritime Board and the Maritime Administration erred in denying an application by a carrier which holds an operating-differential subsidy contract for a service in the foreign trade of the United States, for "written permission" under section 805(a), Merchant Marine Act, 1936, to operate non-subsidized vessels in a separate service in the domestic trade between ports on the Pacific Coast of the United States and Hawaii.

2. Whether the majority of the Federal Maritime Board and the Maritime Administrator gave due weight to the findings of the Hearing Examiner, who recommended grant of the application; and whether they duly considered all material issues of fact, law or discretion presented on the record, and adequately stated their findings and conclusions, together with the reasons or basis therefor, upon all such issues.

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v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD,
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MARITIME ADMINISTRATOR, *Respondents,*

MATSON NAVIGATION COMPANY, *Intervener.*

**Petition for Review of Order of the Federal Maritime Board
and Maritime Administration**

BRIEF FOR PETITIONER PACIFIC FAR EAST LINE, INC.

JURISDICTIONAL STATEMENT

The petition here is to review a final order entered by a two-to-one majority of the Federal Maritime Board and by the Maritime Administration, acting through the Maritime Administrator,¹ denying petitioner's application

¹ The Chairman of the Federal Maritime Board is *ex officio* Maritime Administrator. Both agencies are collectively herein referred to as the "Board", which succeeded to the functions of the former Maritime Commission under Reorganization Plan No. 21 of 1950, pursuant to the Reorganization Act of 1949.

for written permission under section 805(a),² Merchant Marine Act, 1936 (46 U.S.C. § 1101, *et seq.*) to operate vessels carrying cargo between the Pacific Coast of the United States and Hawaii.³ The United States Court of Appeals for the District of Columbia Circuit has jurisdiction of the petition for review by virtue of the Review Act of 1950, section 1031 *et seq.* of Title 5, U.S.C. (Appendix I).

Respondents' and intervener Matson Navigation Company's⁴ motions to dismiss for lack of jurisdiction were denied by this Court in a *per curiam* order filed by Chief Judge Edgerton and Judges Prettyman and Burger on October 11, 1957, "without prejudice to their renewal at the hearing of this case on the merits". Petitioner respectfully refers the Court to its Answer to Respondents' and Intervener's Motions, filed September 23, 1957, for its detailed statement as to this Court's jurisdiction; petitioner reserves further comment for its Reply Brief, in the event the motions to dismiss are hereafter renewed.

STATEMENT OF FACTS

Petitioner Pacific Far East Line, Inc. ("PFEL") operates a steamship service between California ports and ports in the Far East (Trade Route No. 29), for which it holds an operating-differential subsidy contract under Title VI, Merchant Marine Act, 1936. PFEL proposed also to operate non-subsidized vessels in a wholly separate service in domestic coastwise trade between the Pacific Coast of the United States and Hawaii, and, accordingly, filed an application with the Board for "written permission" under section 805(a), Merchant Marine Act,

² Section 805(a) is set forth in Appendix I to this brief.

³ The majority report and order, served May 14, 1957 (herein called the "Report"), together with the dissenting opinion of Vice Chairman Guill and the Recommended Decision of F. J. Horan, Examiner (herein cited as "Rec. Dec."), will be set forth in full in the Joint Appendix, hereafter to be filed.

⁴ Herein "Matson".

1936 (Report, pages 3-5). Section 805(a) provides that the Board "shall not grant any such application" if it finds that "it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of [the 1936] Act".

PFEL's application was set for public hearing before an Examiner of the Board.⁵ Matson intervened in the agency proceeding, in opposition to PFEL's application.⁶

Matson carries between 98 and 99 percent of the total cargo moving by vessels between the Pacific Coast and Hawaii (over 2,200,000 tons in 1954, Report, page 10). Matson's Pacific Coast/Hawaii operations include what it describes as a Pacific Northwest/Hawaii freighter service and a California/Hawaii freighter service (Report, page 7). Matson also operates in the Atlantic-Gulf/Hawaii trade in which, with Isthmian Lines (its partner in a pooling agreement), it also carries by far the greatest portion of the cargo (Tr. 7124-25, 7134-36, 7360-63).⁷ Matson also operates a subsidized service in the foreign trade of the United States between the Pacific Coast and Australia and New Zealand (Trade Route No. 27), as "managing agent" for its wholly-owned subsidiary Oceanic Steamship Company ("Oceanic") (Report, page 10). Matson is controlled by four of the "Big Five", the dominant economic interests in Hawaii, and has intimate ownership, agency, and other relationships with the shippers and receivers of the principal commodities

⁵ PFEL's application (FMB Docket No. S-55) was consolidated for hearing with an application by American President Lines, Ltd. (Docket No. S-52), which was subsequently withdrawn.

⁶ Two other carriers also intervened: Pacific Transport Lines, Inc. ("PTL") and States Steamship Company, Inc., neither of which filed any brief with the agency or has intervened in the review proceeding in this Court.

⁷ Numerical references preceded by "Tr." refer to pages of the transcript of the agency hearing. "Exhibit" references refer to exhibits in the record before the agency.

in the trade between the Pacific Coast and Hawaii (Report, page 10; Rec. Dec., pages 8-10). Matson also operates passenger vessels between the Pacific Coast and Hawaii (Report, page 7), and is extensively engaged in the hotel business in the Islands (Exhibit 3, Item 1, pages 3, 6).

After over 100 witnesses in 45 days of hearings in San Francisco, Honolulu, and Washington, D. C., ending on February 1, 1956, resulting in 7561 pages of testimony and some 1900 pages of exhibits, and after briefs, proposed findings and reply briefs, the Hearing Examiner issued his Recommended Decision containing extensive findings favorable to PFEL, and recommending that PFEL's application be granted. Public Counsel of the Board, who actively participated in the hearings, likewise recommended grant of the application. The Board's Assistant General Counsel for Litigation and its Chief, Regulation Branch, Division of Litigation, joined in Public Counsel's recommendation.⁸

On May 14, 1957, the Board, by a two-to-one vote (Vice Chairman Guill dissenting), without mentioning the Examiner's principal findings, overturned his recommendation and denied PFEL's application. The majority held that to the extent of its California-Hawaii operation, Matson is "operating exclusively in the coastwise or intercoastal service"; that it was therefore entitled to the special protection against "unfair competition" afforded by section 805(a) to an "exclusively" domestic operator; that PFEL's proposed service would "divert" "nearly 10 percent" of the available cargo, thereby "seriously jeopardize Matson's vessel replacement program", and accordingly result in "unfair competition" to Matson in its California/Hawaii service. On the basis of the same findings, the majority also found that PFEL's service "would be prejudicial to the objects and policy of the [Merchant Marine Act, 1936]" (Report, pages 14, 16-19).

⁸ See Appendix II with respect to the function of Public Counsel.

PFEL's Petition for Reconsideration, Reargument and Further Hearing was denied, without explanation, Vice Chairman Guill again dissenting (Board's Order of July 30, 1957).

STATEMENT OF POINTS

I. The majority erred in failing (a) to attach due weight to the Examiner's findings, (b) to give an adequate statement of its findings and conclusions, including its reasons for rejecting the Examiner's findings, and (c) to consider and rule upon all material issues.

II. The majority erred (a) in extending to Matson the protection of an "exclusively" domestic operator under section 805(a) and (b) in finding that PFEL's competition would be "unfair" to Matson.

III. The majority erred in finding that PFEL "would seriously jeopardize Matson's vessel replacement program".

IV. The majority erred in finding that PFEL's proposed service would be "prejudicial to the objects and policy of the Act".

V. The majority action discriminated against PFEL.

SUMMARY OF ARGUMENT

I. The majority failed to attach due weight to the Examiner's findings, to give an adequate statement of its findings and conclusions, and to consider and rule upon all material issues. The majority was not free arbitrarily to disregard the findings and recommendations of the Examiner who had the superior advantages of seeing and hearing the witnesses and of intimate familiarity with the record. Particularly is this true in view of the large record, the numerous witnesses, the conflicting testimony, and the fact that Public Counsel who also actively participated in the hearings, and the Board's Assistant General Counsel

and Chief, Regulation Branch, Division of Litigation, unanimously concurred in the Examiner's recommendations, as did also one Board member. The majority was also required to state its findings and conclusions on all material issues, including its reasons for rejecting the Examiner's findings, with sufficient particularity to permit this Court upon review to test the validity thereof. This it did not do. Indeed, the majority failed to give any weight to the Examiner's findings, or to set forth its reasons for rejecting those findings; the majority also failed adequately to state its own findings and the reasons underlying its conclusions. In addition, it erroneously failed to consider or to make findings with respect to the fact (1) that Matson's own Hawaii operations are conducted without the requisite permission under Section 805(a), and (2) that denial of PFEL's application in effect perpetuates Matson's monopoly, contrary to the antitrust laws and policy of the United States.

II. The majority erred (a) in extending to Matson the protection of an "exclusively" domestic operator under section 805(a), and (b) in finding that PFEL's competition would be "unfair" to Matson. Matson is not "operating exclusively" in the domestic trade, within the meaning of section 805(a), because it operates a *subsidized* service (that of its wholly-owned subsidiary Oceanic) in the foreign trade of the United States between the Pacific Coast and Australia/New Zealand. The majority's contrary holding is unprecedented, contrary to the statute, and contrary to the intention of Congress, as evidenced by the legislative history of section 805(a), and prior construction by the Maritime Commission (the Board's predecessor) and by the Board. Moreover, even in its California/Hawaii operations, Matson is not operating "exclusively" in the domestic trade because it also operates the vessels of Oceanic in the trade between California and Hawaii, as part of a subsidized service in the foreign trade.

In any event, the Board erred in finding that PFEL's competition would be "unfair" to Matson, because PFEL, as the holder of a subsidy contract for its separate service on Trade Route 29, would have no competitive or other advantage in the Hawaii trade which Matson does not also have by virtue of its ownership and operation of Oceanic. The majority did not find that PFEL would have any such advantage; and the Examiner affirmatively found there would be no such advantage, that "PFEL receives no benefit as a subsidized line that is not available to Matson through Oceanic"; that "Matson's witness admitted that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy"; that there was no evidence that any other benefit received by PFEL in the foreign trade would have an unfair impact on Matson; and that indeed "... Matson rather than PFEL would have the advantage in obtaining cargo" (Rec. Dec., pages 10, 18).

III. *The majority erred in finding that PFEL "would seriously jeopardize Matson's vessel replacement program"*. The basis of the majority's finding of "unfair competition" was that PFEL's service "would seriously jeopardize Matson's vessel replacement program". This finding is of questionable relevance to the issue of "unfair competition," in view of holdings that the mere fact that competition may be "troublesome" or may even "increase or render insuperable the difficulties which rivals must face" does not render competition "unfair".⁹ But in any event, the majority's finding is not supported by substantial evidence. The record proves that *Matson has no vessel replacement program*. Moreover, there is an absence of evidence to support the majority's underlying finding that Matson's vessel replacement program would require "an investment of at least 100 million dollars". Matson's witnesses nowhere testified that PFEL would "seriously

⁹ Federal Trade Commission v. Keppel & Bro., 291 U. S. 304, 313 (1934); Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 582 (1923).

jeopardize" the accomplishment of any such program; and the record proves that the problems involved in replacing Matson's fleet, at some indeterminable time hereafter, are of such tremendous magnitude that PFEL's competition would be only one of many factors and a relatively insignificant one. The majority nowhere referred to the Examiner's findings on this matter or to other pertinent considerations presented to it.

In addition, the majority erred in its underlying findings that PFEL would "divert" "nearly 10 percent" of the traffic, and proportionately greater revenue, from Matson. Thus, despite its critical importance, the majority made no finding as to the probable future level of traffic in the trade, but apparently assumed traffic would remain at the same level as in 1950-1954. It ignored the fact that the 1950-1954 data showed a rising trend in traffic, that more recent data of record showed that traffic in the first half of 1955 substantially increased over 1954, and that Matson itself predicted that the 1955 and 1956 traffic would be substantially in excess of that in 1954, and admitted at the close of the hearing that 1955 "was a pretty fat year" (Tr. 7052). The majority also ignored facts which were called to its attention by Public Counsel prior to its decision, based on Matson's own annual reports to the Board, that the actual volume of traffic in 1955 and 1956 substantially exceeded that in 1954 by 18 percent and 26 percent, respectively. The majority should have officially noticed these facts, or at least have granted PFEL's petition to reopen the record to take evidence with respect thereto. The majority also erred in its finding as to the extent of the "diversion" of revenue.

IV. The majority erred in finding that PFEL's proposed service "would be prejudicial to the objects and policy of the Act". The majority's ultimate conclusion that PFEL's service "would be prejudicial to the objects and policy of the Act" is limited to the California/Hawaii trade. It is based upon, and must stand or fall with, the findings that

Matson is entitled to the protection of an "exclusively" domestic operator in that trade and that PFEL's competition would be "unfair" to Matson.

V. The majority action discriminated against PFEL. PFEL seeks permission to operate in the Pacific Coast/Hawaii trade with non-subsidized vessels as part of a voyage wholly in the domestic trades. The Board has granted permission to two other transpacific carriers, Oceanic and PTL, to operate in the Pacific Coast/Hawaii trade with *subsidized* vessels as part of a subsidized voyage in the foreign trade. The majority action therefore discriminates against PFEL. PFEL is at least entitled to an explanation, which the majority of the Board never gave.

ARGUMENT

I. THE MAJORITY ERRED IN FAILING (A) TO ATTACH DUE WEIGHT TO THE EXAMINER'S FINDINGS, (B) TO GIVE AN ADEQUATE STATEMENT OF ITS FINDINGS AND CONCLUSIONS, INCLUDING ITS REASONS FOR REJECTING THE EXAMINER'S FINDINGS, AND (C) TO CONSIDER AND RULE UPON MATERIAL ISSUES.

A. An Agency Must Give Due Regard to an Examiner's Findings and Must State Its Reasons for Rejecting Findings With Which It Disagrees

1. *The majority should have given considerable weight to the Examiner's findings.* The majority of the Board was not free to reject the Examiner's report and recommendations arbitrarily or without explanation. Particularly is this true in view of the large record, the conflicting testimony, and the fact that the Examiner heard and saw each of the many witnesses, and was most intimately familiar with the record, and the further fact that Public Counsel, who also actively participated in the hearing, concurred in the Examiner's conclusions—as did the balance of the Board's staff and its dissenting member.

In *Universal Camera Corp. v. National L. R. Bd.*, 340 U. S. 474, 493-96 (1951), it was held that upon review of

agency action a court must "determine the substantiality of evidence on the record *including the hearing examiner's report*",¹⁰ a holding based in part upon "indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform". Numerous cases¹¹ have held that administrative agencies "*may not disregard the superior advantages of the Examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth*", particularly where, as here, the Examiner had to consider conflicting testimony and inferences to be drawn therefrom, as to need for additional service, whether past service has been adequate and satisfactory to shippers, competitive advantages and disadvantages, "unfairness" of competition, traffic potential, and the accuracy, reliability and interpretation of complicated statistical exhibits.

Accordingly, courts have been "admonished to take *special cognizance* of dissimilar findings of the Trial Examiner [and, we would add, of the Board's staff and its dissenting member] when they are related to matters of evidence" *National Labor Rel. Bd. v. Local 3, Bloomington, etc.*, 216 F.2d 285, 288 (2d Cir. 1954). The Court of Appeals for the Third Circuit recently severely criticized the Securities Exchange Commission for failing to attach weight to the Examiner's findings—even findings which

¹⁰ Emphasis added here and throughout unless otherwise indicated.

¹¹ *United States Steel Co. v. National Labor Rel. Bd.*, 196 F. 2d 459, 467 (7th Cir. 1952); *Ohio Associated Tel. Co. v. National Labor Relations Bd.*, 192 F. 2d 664, 668 (6th Cir. 1951); *Great Western Food Distributors v. Brannan*, 201 F. 2d 476, 479 (7th Cir.) *cert. denied* 345 U. S. 997 (1953); *National Labor Rel. Bd. v. Supreme Bed. & Fur. Mfg. Co.*, 196 F. 2d 997, 998 (5th Cir. 1952); *Minneapolis-Honeywell Reg. Co. v. Federal Trade Com'n*, 191 F. 2d 786, 789 (7th Cir. 1951), *cert. dismissed* 344 U. S. 206 (1952); *National Labor Relations Board v. Ohio Calcium Co.*, 133 F. 2d 721, 724 (6th Cir. 1943); *Wyman-Gordon Co. v. National Labor Relations Board*, 153 F. 2d 480, 483 (7th Cir. 1946); *Folds v. Federal Trade Commission*, 187 F. 2d 658, 661 (7th Cir. 1951).

involved no issue of credibility—stating that the Examiner's "*practical determination is a guide to our conclusion and should have been given due regard by the Commission*".¹² Unquestionably, the majority here was under a duty to attach considerable weight to Examiner Horan's findings.

2. *The majority was also required to give reasons for rejecting the Examiner's findings.* Moreover, the majority was under an obligation to give reasons for rejecting any of the Examiner's findings with which it disagreed. Section 8(b) of the Administrative Procedure Act provides, "The record shall show the ruling upon each such finding, conclusion, or exception presented". In *The Radio Station KFJH Co. v. Federal Communications Commission*, 247 F. 2d 570, 572 (D.C. Cir. June 27, 1957), this Court stated:

"Though a specific ruling on each minor exception is not indispensable, *the parties and the court should not be left to guess, with respect to any material issue, or to any group of minor matters that may have cumulative significance, which of several alternatives the Commission had in mind. It should make the basis of its action reasonably clear.* We cannot find that it did so here. Its statement of reasons comes to little more than this: For one reason or another, all the exceptions not granted are overruled. This court must therefore remand the case to the Commission".

This requirement has been applied both where an agency has rejected exceptions to an Examiner's findings, and where it has rejected the findings themselves, i.e., granted exceptions thereto. As the court in *United Corporation*, *supra*, held:

"... Where the agency fails to adopt the findings of the Hearing Examiner, the Act requires the agency to make a finding or ruling on each exception taken to the intermediate report" (page 21).

¹² In the Matter of the United Corporation, Opinion in Docket Nos. 12,151, et al. (3d Cir., October 24, 1957) at page 16 (reported in part at 7 Pike & Fischer Ad. L. (2d) 561).

The requirements is designed not merely for the benefit of the parties, but for the courts as well, since they "cannot properly exercise [their] appellate function unless the Commission states the reasons for the course it decided to follow".¹³ As the Court stated in *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511 (1935), "We must know what a decision means before the duty becomes ours to say whether it is right or wrong".

B. The Majority's Cryptic "Explanation" for Rejecting the Examiner's Findings Is Insufficient

The majority report will be searched in vain for an indication that it attached any weight to the Examiner's findings. Nor did it even attempt to state its reasons for rejecting his findings. **Indeed, it even rejected without comment findings favorable to PFEL to which no party excepted.** It deleted the principal portion of the last six pages of the Examiner's report, including practically his entire discussion and findings as to the merits of PFEL's application, and much of what preceded, with the cryptic comment:

"We do not agree with the ultimate conclusions and recommendations of the examiner. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been found not related to material issues or not supported by evidence" (Report, page 4).

In the words of the Seventh Circuit, the majority's language here boils down to this: "it is so simply because we

¹³ *Spiegel v. Public Utilities Com'n of Dist. of Columbia*, 226 F. 2d 29, 32-33 (D.C. Cir.), *cert. denied sub nom. Capital Transit Co. v. Spiegel*, 350 U. S. 904 (1955); *American Airlines v. Civil Aeronautics Board*, 235 F. 2d 845, 851-53 (D.C. Cir. 1956), *cert. denied* 353 U. S. 905 (1957). See also *Chesapeake Motor Lines v. United States*, 153 F. Supp. 812, 815 (D.C. Md. August 23, 1957).

say it is so".¹⁴ This "boiler-plate" type of agency "explanation" for rejecting all evidence and findings contrary to its own decision has been universally condemned,¹⁵ and as a matter of law it is insufficient here.

C. A Comparison of the Examiner's Findings and the Majority Report

The following comparison is illustrative of the majority's arbitrary treatment of the Examiner's findings on critical issues:

1. The Examiner found that,

"... it is difficult to see that any objection to the application in question not based on the fact that PFEL receives an operating-differential subsidy could have validity",

and that

"... as regards the receipt of an operating-differential subsidy, there is no substantial difference between PFEL's position and that of Matson ... *PFEL receives no benefit as a subsidized line that is not available to Matson through Oceanic*" (Rec. Dec., page 18).

The Board made no specific contrary findings; it simply omitted the Examiner's findings, without comment.

2. The Examiner found:

"Nor is there support in the evidence for a finding that PFEL would neglect its primary trades or that the

¹⁴ *Stokely-Van Camp, Inc. v. Federal Trade Commission*, 246 F. 2d 458, 465 (7th Cir. July 17, 1957). See also *The United Corporation*, *supra*.

¹⁵ *Baltimore & O. R. Co. v. United States*, 201 F. 2d 795, 799 (3d Cir. 1953); *State Corp. Com'n of Kan. v. Federal Power Com'n*, 206 F. 2d 690, 723 (8th Cir. 1953), *cert. denied* 346 U. S. 922 (1954); *Spiegel v. Public Utilities Com'n of Dist. of Columbia*, *supra*; *Greensboro High-Point Air. A. v. Civil Aeronautics Bd.*, 231 F. 2d 517 (D.C. Cir. 1956); *The Radio Station KFH Co. v. Federal Communications Commission*, *supra*; *Stokely-Van Camp, Inc. v. Federal Trade Commission*, *supra*. See *Amarillo-Borger Express v. United States*, 138 F. Supp. 411 (N.D. Tex. 1956), *dismissed as moot*, 352 U. S. 817 (1957), and cases cited therein.

benefits that PFEL receives or would receive in foreign trade other than operating-differential subsidy would have an unfair impact on Matson" (Rec. Dec., pages 17-18).

The Board made no contrary finding; it simply deleted the Examiner's finding, without explanation.

3. The Examiner set forth almost two pages of findings as to the intricate ownership, agency, and other relationships between Matson, its principal stockholders (four of the so-called "Big Five" in Hawaii), and the shippers and receivers of the principal commodities in the trade, and concluded:

"It is clear that Matson rather than PFEL would have the advantage in obtaining cargo" (Rec. Dec., page 10).

As to most of the Examiner's underlying findings, Matson did not even except. The majority, however, entered only a very brief finding as to "interlocking corporate relationships" and deleted the Examiner's conclusion, again without comment (Report, page 10).

4. In this connection, the Examiner also found that:

"Matson's witness *admitted* that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy" (Rec. Dec., page 10).

Matson did not except to this finding. Yet it, too, was deleted by the majority without comment.

5. In finding that PFEL's service would "seriously jeopardize Matson's vessel replacement program" (Report, page 18), the majority failed even to mention the Examiner's finding that "Matson's witness would not say that the granting of PFEL's application would prevent the consummation of Matson's vessel-replacement program" (Rec. Dec., page 15)—even though again Matson did not

except to that finding. Moreover, particularly as to the finding in question, the majority report is so deficient in supporting findings that it is impossible for the Court upon review to conclude from the report that the majority's conclusion was right.

6. The record contained traffic statistics from 1950 through the first half of 1955 and testimony of various witnesses as to the probable volume of traffic in the future. The Examiner found that Matson's calculations, on the basis of 1950-1954 data, "do not provide a standard for measuring the future effect on Matson of granting PFEL's application" (Rec. Dec., page 15); and continued:

"Moreover, Matson's witness estimated that the volume of traffic between the Pacific coast and Hawaii in 1955 would be 'something over ten percent' greater than the 1954 volume . . ."¹⁶

Matson did not except to the latter finding. Nevertheless, it was omitted by the majority, which confined its consideration to the traffic which moved in 1950-1954, ignored the first-half-1955 data and Matson's testimony which showed substantial increases in traffic since 1954, made no finding as to probable future traffic, and emasculated the Examiner's findings as to the 1950-1954 data (Report, pages 16-17). See Point III-B, *infra*.

7. The majority also emasculated the Examiner's specific findings as to need for service from the ports of Stockton, Longview and Astoria. As to this see Appendix III, *infra*.

8. The Examiner found:

"There is no merit in Matson's contention that it is fundamentally entitled to carry the cargo moving in the domestic coastwise service between United States Pacific-coast ports and Hawaii. If the contention were

¹⁶ He further indicated that Matson's projection for 1956 was also in excess of that for 1954, though not as high as the 1955 projection (Rec. Dec., page 15). See Point III-B-1, *infra*.

correct, no subsidized line could enter the trade. This, obviously, was not intended by Congress in enacting section 805(a)" (Rec. Dec., pages 14-15).

The majority found that Matson is "fundamentally entitled" to the available cargo, without mentioning the Examiner's finding.

9. The Examiner found, as to Matson's exhibits on the availability of cargo space on Matson's vessels:

"... These figures *improperly* include free space on Matson's so-called shuttle ships, which are dispatched in ballast to Hawaii during the peak of the sugar season to bring back full loads of sugar to the mainland. *But even with such space included a high percentage of vessel utilization is indicated.* As noted above, in the first six months of 1955, utilization of the capacity of Matson's outbound vessels in the California/Hawaii service averaged 91 percent, and of Matson's outbound vessels in the Pacific Northwest/Hawaii service, 94 percent. In other words, **for all practical purposes, there was maximum utilization**" (Rec. Dec., page 16).

The majority found:

"Utilization of Matson sailings outbound have ranged from about 80% in 1950 to about 90% in the first six months of 1955" (Report, page 9).

"Though particular sailings have been full and cargoes have on limited occasions been held for a later sailing, *there has been available excess free space on most Matson sailings . . .*" (Report, page 17).

The majority thus failed to mention either the Examiner's criticism of Matson's "vessel utilization" statistics or his finding that "*for all practical purposes*" Matson's vessels were filled to capacity in the most recent period of record (first-half-1955). Nor did the majority anywhere refer to PFEL's contentions, based on the record, that there were further material respects in which Matson's statistics were

inaccurate and unreliable, in addition to the inaccuracies mentioned by the Examiner (PFEL's Brief, pages 3-5).

10. The Examiner found:

"In advancing the contention that PFEL would concentrate on the most favorable cargoes, Matson indicates that the cargoes to which it refers are military and fast-handling cargoes. The evidence affords *no basis for a finding that PFEL would concentrate on such cargoes*" (Rec. Dec., page 17).

The majority not only ignored the Examiner's finding but also found to the contrary, all without explanation, saying only that:

"It is apparent from the record that PFEL would be in a position to concentrate primarily on high value commodities, and would, in effect 'skim the cream' in this trade" (Report, page 16).

11. After 45 days of testimony from numerous shipper, receiver and other witnesses, including the Governor of the Territory of Hawaii (Tr. 3557-3559), in support of PFEL's service, the Examiner found that in view of the "maximum utilization" by Matson of its vessels, and "the above facts as to deficiencies in Matson's service, it can hardly be said that PFEL's service would be superfluous" (Rec. Dec., page 16). PFEL contended, moreover, that whatever Matson's vessel utilization in the past, there are many factors to be considered in determining whether a competing service should be permitted, in addition to the single factor of Matson's bare physical vessel capacity. For example, the scope, frequency and regularity of service, the quality of existing service, the support given by the shipping public, and the need for competition (*e.g.*, PFEL's Brief, pages 32-36).

But the majority, with only the cold record before it, rejected the Examiner's evaluation, ignored PFEL's con-

tentions, found that Matson has the "capacity" to carry the available cargo, and that:

"The record fails to show the need for service in excess of that presently provided by Matson and other existing operators"¹⁷ (Report, page 17).

It is only too plain what was done in preparation of the majority report. Adopting the basic form of the Examiner's report—indeed, even repeating its typographical mistake¹⁸—practically every finding favorable to PFEL was systematically cut out or emasculated, and every conclusion favorable to PFEL was reversed. No weight was attached to the Examiner's findings, and no attempt was made to state the reasons or basis for rejecting those findings, or for failing to make findings with respect to material matters urged by PFEL.

D. Two Additional and Important Issues Which the Majority Failed to Consider or Resolve

Section 8(b), Administrative Procedure Act, provides that, "All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon *all the material issues* of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof". The majority failed to consider or rule upon at least two highly material issues in addition to the matters already discussed.

Thus, PFEL urged to the Board¹⁹ (1) that Matson's Hawaii operations have been and are conducted in violation of

¹⁷ The "other existing operators" in 1954 carried slightly less than two percent of the cargo outbound and perhaps one-third of one percent of the cargo inbound (Report, page 10).

¹⁸ On page 7 of the Recommended Decision, the word "to" in the sentence, "Likewise, Matson's inward sailings to Hawaii are made about once in every 21 days" obviously was meant to be "from". Page 8 of the majority report repeats the error.

¹⁹ PFEL's Brief, pages 10-12, 27-31; Exceptions, pages 2-4; Petition for Reconsideration, etc., pages 13-14.

section 805(a), since Matson does not have the written permission for its own domestic operations required under section 805(a) because of its ownership, operation, and control of Oceanic.²⁰ The majority made no finding as to this issue and stated only that whether Matson's operations are in violation of section 805(a) is "irrelevant" (Report, page 15).

PFEL also urged (2) that Matson's operations have been and are repugnant to the antitrust laws and policy of the United States, and proposed findings which showed on the basis of the record, (a) that Matson's 74-year history in the Hawaii trade has been characterized by a recurring pattern of merger, consolidation, alliance and any other expedient adaptable to the suppression of competition; and (b) that Matson now has a virtually complete monopoly of the Pacific Coast/Hawaii trade and, with its pool partner Isthmian Lines, Inc., an almost as complete monopoly of the Atlantic-Gulf/Hawaii trade.²¹ Nevertheless, the majority made no findings pertinent to these contentions, save as to the volume of traffic carried by Matson in the Pacific Coast/Hawaii trade, and did not consider or make findings with respect to the antitrust implications involved.

Thus, PFEL raised before the Board the basic question of whether, or the extent to which, Matson has a right to have its operations protected from competition under section 805(a) when those operations are themselves in violation of section 805(a), and of statutes dealing with the preservation of competition, *i.e.*, the antitrust laws.

²⁰ PFEL contended that (1) the Board has never determined or considered whether Matson's operations result in unfair competition or prejudice to the objects and policy of the Act within the meaning of section 805(a), (2) any permission which may have been granted is limited to "grandfather" rights, and (3) such "grandfather" rights, based upon Matson's operations in 1935, are not sufficiently broad to authorize Matson's present operations.

²¹ PFEL's Brief, pages 7-10; Exceptions, page 5; Reply to Exceptions, pages 9-10; Petition for Reconsideration, etc., pages 10-13.

In *Breswick & Co. v. United States*, Civ. 101-114 (S.D. N.Y. September 27, 1957) (also reported in part in 7 Pike & Fischer Ad. L. (2d) 522), Alleghany Corporation, which had acquired control of a number of rail carriers, thereafter sought and obtained ICC approval for the issuance of stock. The three-judge statutory court unanimously held that the Commission could not properly *assume* that Alleghany's control of its carrier subsidiaries was lawful, but should have determined that question prior to granting the relief sought. It pointed out that without Commission approval, Alleghany's control was unlawful and thus "subject to injunction, divestiture, and other sanctions" (page 14) (*Cf. United States v. Du Pont de Nemours & Co.*, 353 U.S. 586 (June 3, 1957)), and criticized the Commission's refusal to consider the lawfulness of the relationship in question, as "granting a wrongdoer sanctuary" and "authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act" (page 22). It stated:

"... Alleghany's status under the Act and sole basis for claiming to be entitled to this relief, or any relief under the Act, is *that of a wrongdoer* . . ." (pages 16-17).

"The Interstate Commerce Act was never intended as a source of relief for a person in illegal control of a carrier . . . [R]elief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act" (page 18).²²

Clearly under the *Breswick* case, whether or not Matson is in violation of section 805(a)—the section whose protection the protection of which it here claims—was highly ma-

²² Courts have long used the doctrine of "clean hands" to prevent a wrongdoer from benefiting from his own misconduct. *Ohio Oil Co. v. Sharp*, 135 F. 2d 303, 307 (10th Cir. 1943); *Thompson v. Spear*, 91 F. 2d 430, 434 (5th Cir. 1937), *cert. denied* 302 U. S. 762 (1938); *Hall v. Wright*, 240 F. 2d 787, 795-96 (9th Cir. 1957).

terial. Similarly, we submit, with respect to the antitrust implications of Matson's monopolistic operations.

It has been held that courts may "withhold their aid where the plaintiff is using the right asserted contrary to the public interest";²³ and that, "In its effort to prevent unfair competition the court [or agency] should not lend its aid to the furtherance of perpetual monopolies".²⁴ Yet this is precisely what the Board's majority has done.

Cases such as *Southern Steamship Co. v. National L. Rel. Bd.*, 316 U. S. 31, 47 (1942); *National Broadcasting Co. v. United States*, 319 U. S. 190, 222-25 (1943); and *McLean Trucking Co. v. United States*, 321 U. S. 67, 87 (1944), emphatically hold that an agency may not ignore the antitrust laws in administering its own statutes. The Federal Maritime Board has been specifically admonished by this Court to scrutinize its action very carefully to "make sure" that it does not sanction or perpetuate invasion of the antitrust laws "any more than is necessary to serve the purposes of the regulatory statute". *Isbrandtsen Co. v. United States*, 211 F. 2d 51, 57 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954). It is impossible for the Board to make the determination thus required without first giving some consideration to the nature and extent of the invasion of the antitrust laws which it proposes to sanction or perpetuate. There is no indication of any such consideration by the majority, and there are no findings for the Court to test the validity of the majority's conclusion.

The materiality of the matters under discussion is further evidenced as follows:

The majority held that Matson's California/Hawaii service was "fundamentally entitled" to all the available cargo. Whatever the majority meant, we submit that

²³ *Morton Salt Co. v. C. S. Suppiger Co.*, 314 U. S. 488, 492 (1942).

²⁴ *Socony-Vacuum Oil Co. v. Oil City Refiners*, 136 F. 2d 470, 474 (6th Cir.), *cert. denied* 320 U. S. 798 (1943).

whether that service is itself without the requisite authority under section 805(a) or is repugnant to the antitrust laws, is highly material.

Also, even if the section 805(a) and antitrust violations do not *ipso facto* disqualify Matson from the protection of section 805(a), at least they would cast upon it a heavy burden to show that PFEL's competition would be unfair and prejudicial to the objects and policy of the Act. Cf. *West Coast Bus Lines Common Carrier Application*, 41 M.C.C. 269, 290 (1942), *aff'd* 54 F. Supp. 448 (N.D. Cal.), 323 U.S. 668 (1944):

"In a proceeding such as this, where the fact of a monopoly has been established, *we are entitled to look to protestants for proof*, and we should be able affirmatively to find, that they have not used their exclusive occupancy of the field in question, or allowed it to operate, to the disadvantage of the public, failing which *the very fact of the monopoly may be considered as a circumstance requiring remedial action*".

Moreover, there are innumerable decisions establishing the relevance of past and continuing violations of the law by applicants for operating authority under public interest and convenience-type statutes comparable to section 805(a).²⁵ There is no reason why such violations by a protestant are not equally material, particularly where the protestant seeks the protection of the very statute he is violating.

Finally, compliance with section 805(a) is certainly one of the objects of the 1936 Act. It cannot be said that Matson's failure to comply therewith is "irrelevant" in

²⁵ *City of Camden*, 13 F.C.C. 161 (1948); *International Service in Hawaii*, Av. Law. Rep. ¶ 21,151 (1949); *ABC Freight Forwarding Corporation Extension—Massachusetts*, 285 I.C.C. 276 (1953), *aff'd* 125 F. Supp. 926 (S.D. N.Y. 1954), 348 U. S. 967 (1955); *Lifschultz Fast Freight Extension—Wisconsin*, 285 I.C.C. 659 (1955), *aff'd* 144 F. Supp. 606 (S.D. N.Y. 1956); *Ridge Extension—Various States*, 64 M.C.C. 69 (1955). See *Federal Communications Commission v. American Broadcasting Co.*, 347 U. S. 284, 289 n. 7 (1954).

a proceeding under section 805(a) where one of the statutory issues turns upon an evaluation of the "objects and policy of the Act".

II. THE MAJORITY ERRED (A) IN EXTENDING TO MATSON THE PROTECTION OF AN "EXCLUSIVELY" DOMESTIC OPERATOR UNDER SECTION 805(a), AND (B) IN FINDING THAT PFEL'S COMPETITION WOULD BE "UNFAIR" TO MATSON.

Section 805(a) provides:

"The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act".

Matson stated in the agency proceeding that, "Matson does not and could not object to *fair* competition in serving Hawaii" (Matson's Brief dated July, 1956). The Examiner so found (Rec. Dec., page 18); and the majority of the Board held that Matson, as "the predominant carrier in the Pacific Coast/Hawaii trade . . . should not be protected from *free* competition" (Report, page 19). Thus, the central issue before the Board was "unfair" or "free" competition.

The majority found that "to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California service, an exclusively domestic service . . . " (Report, page 19) within the meaning of section 805(a). PFEL submits that Matson is not entitled to the protection of an "exclusively" domestic operator under section 805(a), and that in any event, the majority erred in finding that PFEL's competition would be "unfair" to Matson.

A. Matson Is Not Entitled to the Protection of an "Exclusively" Domestic Operator, Under Section 805(a)

1. *Matson owns and operates a subsidized service in the foreign trade of the United States.* Section 805(a) provides that, "The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm or corporation *operating exclusively in the coastwise or intercoastal service . . .*" However, Matson is *not* "operating exclusively in the coastwise or intercoastal service" because *Matson owns and operates a subsidized service in the foreign trade of the United States.*

The underlying facts are not in dispute. Matson is the sole owner of Oceanic Steamship Company, which since 1937 has held various operating-differential subsidy contracts with the Board (Exhibit 61), providing for the operation of vessels, under subsidy, on Trade Route No. 27 between the Pacific Coast and Australia/New Zealand (Report, page 10).²⁶ However, Oceanic has no independent management and no independent operating organization in the United States. As the majority found:

"... Matson and Oceanic have identical officers, directors, management, and freight traffic staffs in the United States (except for a freight traffic manager, his assistant, and a stenographer employed solely by Oceanic in its San Francisco office), and have common offices, agents, and terminals" (Report, page 10).

Accordingly, Matson and its subsidiary, Oceanic, have entered into an "agreement" (Exhibits 62 and 147), which provides that Matson "agrees to be bound by all of the provisions" of subsidy contracts between Oceanic and the Board, and that "Oceanic appoints Matson as its managing agent and not as an independent contractor to *manage and conduct the vessels and steamship business of*

²⁶ The majority Report, page 10, describes Oceanic's service as "substantial".

Oceanic in the same manner as though owned by Matson" Matson and Oceanic have had such an agreement from the inception of Oceanic's subsidized operations; and it has been formally approved by the Board (Exhibits 68 and 148). "Oceanic's" subsidized service is owned by Matson, operated by Matson, and advertised under Matson's name.²⁷ Clearly, therefore, Matson in fact is not "operating exclusively in the domestic coastwise or intercoastal service".

2. *The majority's holding is unprecedented and contrary to law.* The majority held that Matson's so-called Pacific Northwest/Hawaii service was not "exclusively" domestic because it included calls at British Columbia, but that, "In its service between California and Hawaii [Matson] clearly operates 'exclusively' in the domestic service" (Report, page 14), and that "To that extent Matson is clearly entitled to the protection of section 805(a)" (Report, page 15). The majority relied upon *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B.-M.A. 488, 501 (1954), wherein the special protection provided by section 805(a) to an "exclusively" domestic operator was extended to operators who furnished a service exclusively in the domestic intercoastal trade, even though one of them operated a separate service in the foreign trade and the other from time to time chartered certain vessels for foreign trade operations.

In fact, the *APL* case is no precedent for the majority action, because unlike Matson, neither of the operators protected in the *APL* case (nor in two similar cases)²⁸ operated any *subsidized* service in the foreign trade or had any affiliation whatever with any other carrier holding a subsidy contract. Congress intended that the special

²⁷ See Exhibits 121 and 122, schedule of sailings, headed, "Matson Lines, Schedule of Sailings, Matson Navigation Company, The Oceanic Steamship Company".

²⁸ Amer. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17, 3 F.M.B.-M.A. 457, 470 (1951); Amer. Pres. Lines, Ltd.—Sec. 805(a) Application, 4 F.M.B.-M.A. 436, 440 (1954).

protection of section 805(a) for "exclusively" domestic operators should be employed *against* subsidized operators such as Matson, not for their protection.

The intention of Congress in enacting section 805(a) is shown by its legislative history. Prior to 1936, the Postmaster General, and a special Senate Committee headed by Senator Black, separately investigated and reported upon various practices and abuses under the then existing ocean mail subsidy system. The Postmaster General reported that subsidized companies "have also formed corporations to operate intercoastal and coastwise vessels in competition with nonsubsidized American lines, contrary to the spirit of the law . . ." (H. Doc. 118, 74th Cong., 1st Sess. (1935), page 11).²⁹ This, of course, is precisely what Matson and Oceanic have done, except that Matson has virtually no competition in the Hawaii trade.

The Black Committee found similar abuses and recommended unconditionally that "no operating subsidy should be paid to a shipping operator whose business or interests are in the protected coastwise or intercoastal . . . trades . . ." (S. Rept. 898, 74th Cong., 1st Sess. (1935), pages 42-43; see also pages 14-15). The bill, as enacted, contained only a conditional prohibition, but the scope of that prohibition was unchanged. It was still intended to *restrict*, not to *protect*, companies such as Matson.

It may be noted also that the principal industry support for proposals limiting subsidized lines' participation in domestic trade came from officials of the A. H. Bull Steamship Company and Luckenbach Steamship Company, Inc., both of which were domestic operators and neither of which had received subsidy or had any affiliation with companies receiving subsidy.³⁰

²⁹ See Appendix IV, *infra*.

³⁰ Hearings on H. R. 7521, 74th Cong., 1st Sess. (1935), pages 676-79, 616-26; Hearings on S. 2582, 74th Cong., 1st Sess. (1935), pages 228-29, 562-63.

That Matson, as the owner and operator of a subsidized line, is not within the class of persons intended to be protected by section 805(a) is also evidenced by the consistent distinction which has been made between subsidized companies and their affiliates, on one hand, and "exclusively" domestic operators on the other. Thus, section 805(a) refers separately (1) to subsidy contractors, their holding companies, subsidiaries, affiliates, associates, officers, directors and agents and (2) to persons, firms or corporations "operating exclusively in the coastwise or intercoastal service". A similar distinction was employed by the Senate Commerce Committee in its report following hearings on S. 3500 (74th Cong., 2d Sess.), section 529(a) of which contained provisions which were materially the same as section 805(a) of the final Act:

"Ownership of any interest whatever in the coastwise business is prohibited, except that the Authority after public hearing, if it find that the public interest and convenience so require, may grant permission to engage in the coastwise trade, if it does not cause unfair competition to any person operating exclusively in the coastwise or intercoastal service" (S. Rept. 1721, 74th Cong., 2d Sess. (1936), page 19).

Thus the Committee also distinguished between companies such as Matson, which have interests both "in the coastwise business" and in subsidized foreign operations, on one hand, and "persons operating exclusively in the coastwise or intercoastal service", on the other.

The Maritime Commission, the agency charged with administration of the 1936 Act in the years immediately following its passage, similarly stated in a memorandum to the House Committee on Merchant Marine and Fisheries, printed in Committee Hearings on H. R. 5130, 76th Cong., 1st Sess. (1939), Part II, page 199:

"The present section [805(a)] has a dual purpose:

"(1) To prevent 'diversion' or 'piping' of subsidy money or subsidized property into *related domestic-trade* companies; and

“(2) To accord *purely domestic-trade operators* protection against any ‘unfair’ competition which might arise by reason of the subsidy system”.

Thus, the Maritime Commission also distinguished between “*related domestic-trade companies*”, as Matson clearly is, and “*purely [i.e., exclusively] domestic trade operators*”, as Matson is not. *Unquestionably, the Congress intended to protect the latter group from unfair competition by the former, not to protect carriers in the former group from the competition of each other.*

The Board itself has stated in *Amer. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F.M.B.-M.A. 457, 470:

“In adopting the Merchant Marine Act, 1936, Congress manifested a special concern for the protection of coastwise and intercoastal operators, who are *not eligible for subsidy*, against the competition of *subsidized lines* (secs. 506, 605(a), 805(a))”.

But Matson does not qualify as an operator “not eligible for subsidy” since it already has a subsidy, in the same sense as does PFEL. The only difference, which has not the slightest materiality for regulatory purposes, is that for Matson’s own internal reasons it has elected to place its subsidized operations in the name of a corporate subsidiary, which in fact is simply a corporate instrumentality of Matson. PFEL’s competition—with *unsubsidized vessels*—is no more or less the “competition of subsidized lines” than is Matson’s.

The necessary conclusion is that Matson is *not* “operating exclusively in the coastwise or intercoastal service” in fact, or within the language or intendment of section 805 (a), and that it therefore is not entitled to the protection of an “exclusively” domestic operator, either as to its California/Hawaii operations, as the majority held, or as to any other operations.

3. *Even Matson's California/Hawaii operations are not "exclusively" domestic.* Indeed, even Matson's California/Hawaii operations are not "exclusively" in the domestic trade. In *Oceanic S. S. Co.—Subsidy, Route 27* 3 U.S.M.C. 309, Oceanic applied for and received permission under section 805(a) for its subsidized vessels operating in the foreign trade also to carry domestic cargo between the Pacific Coast, including California, and Hawaii, as part of their subsidized voyages. On September 14, 1951, the Board renewed its permission for Oceanic "to engage in the domestic service between the United States and the Hawaiian Islands" (Exhibit 59, paragraph 8).

On January 25, 1956, the Federal Maritime Board again extended that permission, "so as to permit Oceanic's subsidized cargo vessels *to continue to carry domestic cargoes between the West Coast of the United States and Hawaii* in the Trade Route 27 Freight Service under Oceanic's new Operating-Differential Subsidy Agreement, Contract No. FMB-44 . . ."³¹

Thus, the Board has granted its permission for Oceanic's subsidized vessels to operate in the California/Hawaii trade as part of their subsidized foreign voyages. Oceanic's service, as shown, is operated by Matson, with the same organization with which it operates its own so-called California/Hawaii service. Therefore, even Matson's California/Hawaii operations are not "exclusively" domestic. No mention of this fact appears in the majority's report.

³¹ This action by the Board is reflected in the Board's minutes, an extract from which was furnished to us by the Board's Secretary and which is set forth in Appendix V, *infra*. It was not made known until after the record herein closed, but apparently was first communicated to Matson and Oceanic by letter of February 2, 1956, of which Matson in its Brief to the Board, page 50, requested the Board to take notice. Under the circumstances, we believe the Board's action of January 25, 1956, may be noticed by this Court.

**B. PFEL's Competition Would Not be "Unfair" to Matson
Within the Meaning of Section 805(a)**

Whether or not Matson technically is an "exclusively" domestic operator as to its California/Hawaii operations, PFEL's competition would not be "unfair", within the meaning of section 805(a), because PFEL, as the holder of a subsidy contract for its separate Trade Route 29 service, would have no advantage in the Hawaii trade which Matson does not also have from its ownership and operation of Oceanic.

Nowhere in the majority report was there any finding that PFEL in its Hawaii service would have any competitive or other advantage over Matson in the Hawaii trade, whether "fair" or "unfair", and however derived. The sole reason stated by the majority for denying PFEL's application was that its service "would seriously jeopardize Matson's vessel replacement program" (see Point III, *infra*). The Examiner, after discussing this matter in detail (Rec. Dec., pages 16-18), found (1) that "... it is difficult to see that any objection to the application in question not based on the fact that PFEL receives an operating-differential subsidy could have validity" (Rec. Dec., page 18); (2) that "... as regards the receipt of an operating-differential subsidy, *there is no substantial difference between PFEL's position and that of Matson*", and that "... *PFEL receives no benefit as a subsidized line that is not available to Matson through Oceanic*" (Rec. Dec., page 18); (3) that "Matson's witness *admitted* that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy" (Rec. Dec., page 10)—*to which finding Matson did not except*; and (4) "Nor is there support in the evidence for a finding . . . that the benefits that PFEL receives or would receive in foreign trade *other than operating-differential subsidy* would have an unfair impact on Matson" (Rec. Dec., pages 17-18).

*The majority made no contrary findings;*³² indeed, it completely ignored the Examiner's findings.

It may be noted that Public Counsel also concluded (his Brief, page 21), "... PFEL's status as a subsidized competitor does not entail any advantage to PFEL which is not for all practical purposes duplicated by Matson as the sole owner of Oceanic"; and Vice Chairman Guill concluded:

"... Here, however, Matson, through its wholly owned subsidiary Oceanic, has available to it substantially the same subsidy benefits which would be available to PFEL in connection with its proposed unsubsidized Hawaiian operations. *Furthermore, Matson Oriental Line, another Matson subsidiary, presently has pending an application for subsidized operations*" (Dissenting Opinion, Report, pages 21-22).

The Examiner in fact found that Matson would have the advantage over PFEL. At pages 8-10 of his Recommended Decision, the Examiner made detailed findings as to the intricate ownership, agency, and other relationships between Matson, its principal stockholders (four of the so-called "Big Five" of Hawaii), and the most important and powerful shippers in Hawaii, and concluded:

"... it is clear that Matson rather than PFEL would have the advantage in obtaining cargo" (Rec. Dec., page 10).

With an immaterial exception,³³ Matson did not except to the detailed findings underlying the Examiner's conclu-

³² Nor did it mention PFEL's contentions in this respect. PFEL's Brief, pages 25-26, 36-38; Reply Brief, pages 8-9; Reply to Exceptions, pages 9-12.

³³ Matson excepted to the Examiner's finding that the "Big Five" "... fully control the policies of twenty-six of the twenty-seven sugar producing plantations in Hawaii" (Rec. Dec., page 9) (Matson's Exceptions, page 52); but it did not except to the finding that "the five companies mentioned run it [the sugar industry] through the Hawaii Sugar Planters Association . . ." (Rec. Dec., page 9).

sion, although it did except to his conclusion. Yet, as previously stated, the majority omitted most of the underlying findings and the Examiner's conclusion, and gave no consideration whatever to the extent of Matson's advantage over PFEL.

In *United Corporation, supra*, it was held:

"... In the determination of whether the Commission's Order was supported by substantial evidence, the more specific findings of the Hearing Examiner, rejected by the Commission without the making of any express new findings, are entitled to *considerable weight*" (page 17).

Not only are they entitled to *considerable weight*, but in the absence of any majority finding to the contrary or even any suggestion in the majority report that PFEL would have some advantage which Matson does not also have by virtue of its ownership and operation of Oceanic, PFEL's competition as a matter of law cannot be "unfair" to Matson, within the meaning of section 805(a). At a minimum, as shown in Point I, *supra*, the Examiner's findings should have been considered and weighed by the majority—but weren't.

III. THE MAJORITY ERRED IN FINDING THAT PFEL WOULD "SERIOUSLY JEOPARDIZE" MATSON'S VESSEL REPLACEMENT PROGRAM

The sole basis of the majority's finding of "unfair competition" was its conclusion that "Matson's vessel replacement program for Pacific Coast freighters will require an investment of at least 100 million dollars" (Report, page 17), and that the "diversion of the volume of cargo which PFEL would carry would seriously jeopardize" that program (Report, page 18). These findings are

of doubtful relevance to the question of unfair competition,³⁴ but in any event are clearly contrary to the record.

A. The Record Will Not Support the Majority's Finding That PFEL Would Seriously Jeopardize Matson's Vessel Replacement Program

1. *Matson has no vessel replacement program.* There is no evidence that Matson in fact has a vessel replacement program. The undisputed testimony of Matson's witnesses proves that Matson does *not* have a vessel replacement program, and that it has no present idea of what the service requirements of the trade will be when it comes time to replace its present fleet, or what type of vessel, vessel propulsion, or cargo handling methods it will employ in the future. Matson's Comptroller, Mr. Schreiner, testified that Matson had "a program for *studying* the situation, to determine what type of ships, what the service requirements will be" (Tr. 2777); that Matson had publicly announced it was investigating the possibility of employing "atomic propulsion, van ships [and] sea train type operations" in the Hawaii trade (Tr. 2778); but that, "I don't know what the probabilities are" that Matson may be considering a completely different type of ship on which past operating results are meaningless (Tr. 2790).

Mr. Laidlaw, Matson's Vice President, and the only other witness who testified on this subject, stated that the studies to which Mr. Schreiner referred embrace "containerization, unitization, trailer-ships and other ways and means of transporting" freight between Hawaii and the mainland (Tr. 7373); that "it is reasonable to assume that the outcome of studies and experiments will result in a greater degree of unit handling through containeriza-

³⁴ The mere fact that competition may be "troublesome" or may even "increase or render insuperable the difficulties which a rival must face" does not render such competition "unfair". *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, 313 (1934); *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 582 (1923).

tion or unitization of one character or another" (Tr. 7374); that "studies progressively show that more and more [freight] will move" in containers (Tr. 7375); that "*exactly what type of a ship is going to be the result is going to have to be first determined by how the goods can be containerized or unitized*" (Tr. 7375); that, ". . . in the long-range program, I visualize an improvement and a different kind of vessel than we have today, *but just what the form that will take, I don't think any of us have progressed far enough*" (Tr. 7375); that it was impossible to say how Matson's "profit and loss picture will be affected" because "*we haven't reached that point, and it hasn't reached the point where a dollar sign can be put on it*" (Tr. 7376-77) (see also Tr. 7378); *and that Matson does not "know what the future holds"* (Tr. 7379).

2. *There is also a total absence of evidence to support the finding that Matson's vessel replacement program would require "an investment of at least 100 million dollars".* It is not clear whether the majority meant that the total cost of Matson's vessel replacement program would be at least 100 million dollars or that Matson initially would be required to invest that much of its own funds in such a program. Whatever the majority intended, there is not even a "guess" in the record as to what any such vessel replacement program would cost, much less "substantial" evidence that it "will require an investment of at least 100 million dollars". Mr. Schreiner testified that "in round figures", Matson has an investment of \$20,000,000 in its *existing* Pacific Coast/Hawaii fleet (Tr. 2783-84), purchased between 1946 and 1948 (Exhibit 3, Item 1, page 5). On the basis of "*an estimate which I have carried in my mind, I confess not knowing where I have seen it*" (Tr. 2783), he further estimated that it would cost "some six to eight times" or "somewhere from six times twenty or a hundred twenty to a hundred sixty million dollars" (Tr. 2783) to replace its *existing* fleet with "the same type ships [Matson is] operating now"

(Tr. 2785). This is not "substantial" evidence, if it were material; and it is not material because the testimony of Mr. Schreiner and Mr. Laidlaw, quoted above, shows that if Matson ever seeks to replace its present vessels, it will *not* be with the same type ships Matson is presently operating. And even if Matson presently had a program for replacing its vessels in the future, it is presently impossible, as Mr. Schreiner testified, to "forecast . . . what future prices may be" (Tr. 2781).

Matson itself requested no finding that it had a vessel replacement program or as to what its cost might be if ever such a program should be developed. In its Exceptions, page 46, its counsel set forth a calculation of "Years Required by Matson to Accumulate Down Payment to Replace Pacific Coast Freighter Fleet" which made certain "Assumptions Based on Testimony"—including the "assumption" that it would cost \$100 million to replace its fleet. See Appendix VI. *No evidence was cited in support of this "assumption", because none existed.* Nevertheless, this insupportable "assumption" of Matson's counsel on Exceptions apparently was the foundation of the majority's finding as to the cost of replacing Matson's vessels, which in turn was the premise for its conclusion that PFEL would "seriously jeopardize" Matson's vessel replacement program.

3. *There is no evidence PFEL "would seriously jeopardize" any Matson vessel replacement program.* Even Matson's witnesses would not go as far as the majority's findings. The Examiner significantly found, "Matson's witness would not say that the granting of PFEL's application would prevent the consummation of Matson's vessel-replacement program" (Rec. Dec., page 15)—*to which finding Matson did not except*, but which the majority nevertheless omitted from its report, without explanation.

On direct examination Mr. Schreiner asserted broadly that, "If Matson is deprived a [sic] future cargo revenue

in either the Northwest or the California cargo services", it "will seriously *aggravate*" Matson's vessel replacement "*problem*" (Tr. 2601). On cross-examination, the witness admitted that even with Matson's present monopoly, and irrespective of the action upon PFEL's application, its Pacific Northwest service produces insufficient revenue to enable vessel replacement "under foreseeable replacement costs", and "*I don't see the possibility*" of replacing the vessels in the Pacific Northwest service (Tr. 2600-01); as to its California service, he asserted that vessel replacement it "*quite unlikely*" (Tr. 2601). He agreed, moreover, that the Matson program was already so great as to be "very difficult without any aggravation" (Tr. 2789). When he was asked (over Matson's counsel's objection) if Matson was "willing to say . . . that it is the company's position that the granting of this application of PFEL will prevent the consummation of whatever vessel replacement program Matson may have now or many develop in the future" (Tr. 2786), he did not comply with the Examiner's request to "give a yes or no answer", but finally replied that Matson "would expect each service to provide out of the results of its operations the means of continuing in the future, *but whether or not other resources of the business may be necessary to accomplish a replacement program in the future is not a matter that we can decide at this time*" (Tr. 2787). He concluded, "To me it is so much a *prospective question, so much what may happen in the future*, that I can't give a better answer than I have given you" (Tr. 2789).

Nowhere did Mr. Schreiner or any other Matson witness state that PFEL "would seriously jeopardize" Matson's vessel replacement program; yet the majority categorically found the very thing Matson's witnesses repeatedly refused to say, without even mentioning the Examiner's findings. The Examiner's finding could not have been omitted because of any belief that it was wrong, because it was so obviously correct that Matson did not except thereto. Nor could it

have been omitted because it was immaterial—since it clearly was of the utmost materiality. **It is impossible to avoid the implication that despite its correctness and materiality, it was omitted because it was inconsistent with—indeed, it would have destroyed—the entire structure underlying the majority's ultimate finding.**

4. *PFEL's competition would be a relatively insignificant factor, compared to the tremendous problems involved in replacing Matson's fleet.* As shown above, the record will not support the finding that Matson's vessel replacement program will cost "at least 100 million dollars". If in fact any future vessel replacement program should cost Matson less than the \$100 million erroneously assumed by the majority, the conclusion that "diversion" of cargo to PFEL would "seriously jeopardize" that program is insupportable, without evidence as to how much less—and there is no such evidence. More importantly, whatever the cost to Matson, whether more or less than \$100 million, the gravity of Matson's vessel replacement problem, of course, would be in direct proportion thereto. While it may not be possible to fix with mathematical exactitude, manifestly there is a point at which the cost to Matson of replacing its fleet would be so great and the impact of PFEL's competition relatively so small as to be insignificant or minimal for practical purposes—i.e., even if PFEL's competition would have some adverse effect, it would not "jeopardize", much less "seriously jeopardize", replacement of Matson's vessels. Mr. Schreiner's testimony, quoted above, strongly indicates that this in fact is the precise situation which Matson now faces; and this conclusion is confirmed by the following:

(a) The Board's majority itself found that, "Even at present voyage profit levels the replacement of vessels for Matson is a serious problem" (Report, page 17).

(b) The majority's finding just quoted is a gross understatement. The House Committee on Merchant Marine and Fisheries found, after public hearings (at which a Matson representative, among others, testified), in H. Rept. 843,³⁵ dated June 15, 1955, which Matson introduced in evidence in the agency proceeding, that, "One of the most pressing problems confronting the American merchant marine today is the matter of block obsolescence . . ."; that except with respect to vessels eligible for both construction subsidy and operating subsidy (by law neither PFEL or Matson would be eligible for any subsidy in the Hawaii trade here involved), "*. . . there is practically no thought of replacing the vessels even with Government assistance*"; that with respect to the non-subsidized segment of the American-flag fleet, the outlook is "*tragic*"; that "The operating cost for vessels in these services has risen to such a point that *there is no prospect whatsoever for future replacements*", and that "*. . . the gravity of the picture for the subsidized lines is far out-shadowed by the grim outlook of the nonsubsidized segment of the fleet*".³⁶

(c) In the public hearings of the House Merchant Marine and Fisheries Committee, upon which H. Rept. 843, *supra*, was based,³⁷ the Matson witness, Mr. Creighton Peet, Vice President, testified just a few months prior to the testimony of Messrs. Schreiner and Laidlaw in the agency proceeding that Matson "*definitely*" would not be

³⁵ H. Rept. 843, 84th Cong., 1st Sess., entitled "Vessel Replacement in the American Merchant Marine", June 15, 1955. Extracts of this report were introduced in evidence by Matson (Exhibit 3, Item 20), and the Examiner ruled, at Matson's request, that he would officially notice the entire report (Tr. 2601-02).

³⁶ *Id.*, pages 1, 2, 3.

³⁷ Under the circumstances (see note 35, *supra*), PFEL believes the agency might officially notice, and the Court might now judicially notice, Mr. Peet's testimony before the House Merchant Marine and Fisheries Committee, which has been officially printed (note 38, *infra*).

able to replace its freighter fleet "without some kind of assistance".³⁸ In the context of the Committee Hearings, "assistance" meant federal assistance in one form or other. In other words, a high Matson official has publicly testified to a responsible Committee of Congress that Matson cannot replace its Hawaii freighter fleet without assistance from the federal government. Nothing in the testimony of Messrs. Schreiner and Laidlaw suggests the contrary. Yet the majority here, arbitrarily and without any support in the record, found that PFEL "would seriously jeopardize" Matson's non-existent vessel replacement program. When PFEL then moved to reopen the record to ascertain the facts (PFEL's Petition for Reconsideration, etc., pages 1, 18), the majority without explanation denied its motion.

(d) In the exhibit in Matson's Exceptions, page 46, mentioned above, entitled "Years Required by Matson To Accumulate Down Payment to Replace Pacific Coast Freighter Fleet", a number of alternative calculations were set forth, based on Matson's financial data for the years 1950-1954 and various adjustments, as in the footnote.³⁹ Matson there asserted that it would require up to 46.4 [!] years to replace its fleet, even without competition from PFEL. However, the useful economic life of an ocean-going vessel is only approximately 20 years,⁴⁰ —which means that if Matson's calculations are to be given

³⁸ Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 4118, *et al.*, 84th Cong., 1st Sess., May 11, 1955, page 87 ("Vessel Replacement Program"). See Appendix VII.

³⁹ See Appendix IV.

⁴⁰ Exhibit 3, Item 20, Tr. 1. Matson's vessels are depreciated for tax purposes on a 20-year basis (Tr. 3328-29). Section 605(b) of the Merchant Marine Act, 1936, similarly prohibits the payments of operating subsidy on vessels over 20 years of age, except upon specific conditions. See also the Examiner's Initial Decision in Docket No. 808, page 7, in which he states, of Matson's vessels, that, "The economic life of [vessels] usually is set at 20 years or slightly longer" (see note 46, *infra*).

any credence, Matson's vessels will be scrapped long before they can be replaced, *whether or not PFEL's application is granted.*⁴¹

Indeed, Matson's counsel stated on the record in the agency proceeding (Tr. 2826-27):

"We do *not* say that PFE and PFE alone is the straw that breaks the camel's back in the replacement problem. *There are many factors.* We have stated on the witness stand that the granting of their application will aggravate a *very grim situation*".

Even this is a far cry from the majority's categorical finding that PFEL "would seriously jeopardize Matson's vessel replacement program".

The inescapable conclusion is that even if PFEL's competition would have some adverse effect upon Matson's net revenues, it would be only one, and a relatively insignificant one, of many relevant factors. The majority erred in failing so to find, in failing to consider any of the other factors to which Matson referred, in arbitrarily refusing even to consider or make findings as to PFEL's contentions⁴² and in denying PFEL's petition for further hearing. There is an absence of any evidence, much less of substantial evidence, to support the majority's findings that PFEL "would seriously jeopardize Matson's vessel replacement program".

⁴¹ Matson argues that with PFEL's competition it would take 50.4 years or more to replace its vessels, while conceding that it may take up to 46.4 years even without competition; thus, in effect, it contends that its monopoly should be protected for another 46.4 years in order that it may be permitted to replace its fleet by 2002 A.D. instead of 2006 A.D.—a manifest absurdity.

⁴² PFEL's Reply Brief, pages 6-7; Reply to Exceptions; pages 7-9; Petition for Reconsideration, etc., pages 18-19.

B. The Majority Also Erred in Its Findings as to the Extent That PFEL Would "Divert" Traffic and Revenue From Matson

1. *Traffic moving in the Hawaii trade.* The majority found that PFEL would divert 10 percent or "nearly 10 percent" of the cargo that would otherwise be carried by Matson (Report, pages 16-17). However, this conclusion, which underlay the finding of "serious jeopardy" to Matson's vessel replacement program, was based upon 1950-1954 data, without any finding or consideration whatever as to the probable level of traffic available in the future.⁴³ In fact, the record also contained more recent traffic data, in detail, for the first half of 1955,⁴⁴ which, projected on an annual basis, showed that the traffic in the Pacific Coast-to-Hawaii trade would be substantially greater in 1955 than in 1954—indeed greater than in any year since World War II. The majority failed so much as to mention the 1955 data.

Even on the basis of data through 1954, Public Counsel found "substantially" increased traffic outbound (i.e., to Hawaii) (Reply of Public Counsel, page 4, dated October 31, 1956), and, for the future, "a rising trend" (Public Counsel's Brief, page 10, August 13, 1956).⁴⁵ The majority also ignored this evidence.

The record also contained predictions by Matson's witnesses as to future levels of traffic;—indeed in January

⁴³ In other cases the Board has specifically recognized its obligation to consider and to make some finding with respect to the future traffic moving in the particular trades involved, based on its "best available judgment as to what the future may have in store". States Steamship Company—Application for Operating-Differential Subsidy in the U. S. Pacific Coast/Far East Service, FMB Docket No. S-56, Report served May 14, 1956 (citing Bloomfield S. S. Co.—Subsidy, Routes 13(1) and 21(5), 4 F.M.B. 305 (1953)).

⁴⁴ *E.g.*, Exhibit 70, pages designated "P.C.O-A" and "P.C.I-A".

⁴⁵ Public Counsel found that inbound traffic (from Hawaii) "remained about stationary at the level of approximately 1,100,100 tons" between 1951 and 1954 (Reply of Public Counsel, page 5).

1956, at the close of the hearings, Matson's witness testified that while accurate figures for 1955 were not yet available ". . . 1955 was a pretty fat year" (Tr. 7052). The Examiner found: "Moreover, Matson's witness estimated that the volume of traffic between the Pacific coast and Hawaii in 1955 would be 'something over 10 percent' greater than the 1954 volume . . ." (Rec. Dec., page 15). Matson did not except to this finding, but it was deleted from the report of the majority, without explanation.

The Examiner also referred to the testimony of Matson's witness that "the 1956 projection 'was not expected to be as good as 1955 by some five or ten percent' " (Rec. Dec., page 15), and at the oral argument on April 8, 1957, Matson's counsel advised the Board, in response to a question, that Matson had not materially increased its cargo in the Pacific Coast/Hawaii trade since the record closed (Transcript of Oral Argument, pages 32-39; see especially pages 35-39). However, Public Counsel advised the Board at the oral argument that Matson's annual reports filed with the Board showed that Pacific Coast/Hawaii cargo had increased **18 percent, 1955 over 1954, and 26 percent, 1956 over 1954** (Transcript of Oral Argument, pages 87-90). Matson's counsel on rebuttal did not dispute this fact. Following the oral argument, PFEL requested the Board to take official notice of the actual traffic moving in the Hawaii trade subsequent to the date of record or, in the alternative, to reopen the record to receive such evidence (Letters of April 12 and 15, 1957, from PFEL to James L. Pimper, Secretary, Federal Maritime Board and Maritime Administration). This request was not granted (Board's Order of April 24, 1957). Following the majority report, PFEL renewed that request (Petition for Reconsideration, Reargument, and Further Hearing, pages 19-20),

pending which another Examiner of the Board, in a separate proceeding⁴⁶ found that:

“In 1956, Matson carried 3,394,587 revenue tons of cargo, inclusive of military, between Hawaii and the Pacific Coast” (page 11)

—which is an increase of 26 percent over 1954 (confirming Public Counsel’s advice to the Board during oral argument).⁴⁷ Nevertheless, the majority still refused to reopen the record to permit PFEL to introduce evidence thereof.

Thus, despite every indication—including evidence of a rising traffic trend through 1954, data of record for the first half of 1955 showing further increases, Matson’s testimony in the agency proceeding as to the outlook for 1955 and 1956, its admission that 1955 was a “fat” year, Matson’s reports to the Board for 1955 and 1956, and the Examiner’s findings in Docket No. 808—that traffic levels in the Pacific Coast/Hawaii trade have been materially increasing since 1954 and will increase in the future, the majority arbitrarily assumed that the traffic in the future would remain at the 1950-1954 level, ignored contrary evidence of record and, without explanation, refused to reopen the record to permit PFEL to show the error of its assumption.

2. *The majority’s erroneous finding as to the diversion of revenues from Matson to PFEL.* The Board found that the diversion of revenues may be “substantially greater” than the diversion of tonnage because:

“... It is apparent from the record that PFEL would be in a position to concentrate primarily on high value commodities, and would, in effect, ‘skim the cream’ in this trade” (Report, page 16);

⁴⁶ Initial Decision of C. W. Robinson, Examiner, in Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increase in Rates, FMB Docket No. 808, served June 25, 1957. Matson was the principal party.

⁴⁷ According to Exhibit 86 in the instant proceeding, Matson carried 2,688,707 revenue tons in 1954.

—and because PFEL would provide service to Hawaii outports by transshipment at Honolulu with an inter-island carrier, while Matson would provide a “more costly, direct service to Hawaiian outports” (Report, page 16).

There is no evidence that PFEL would here be in a better position to concentrate on high value commodities than would be the smaller carrier or carriers in *any* trade in which there is competition, and no evidence whatever that it would in fact concentrate on high value commodities. Nor does it necessarily follow that “high value” commodities would result in the greatest net return to the carriers. And it is nowhere evident by what reasoning the majority transformed its finding that PFEL “would be in a *position*” to concentrate on high value commodities into a categorical finding that PFEL “would, in effect, ‘skim the cream’ in this trade” (Report, page 16). While Matson’s counsel so charged, that charge was substantially repudiated both by Matson’s own freight traffic executive (Tr. 7322-34), and by the Examiner, who found, “*The evidence affords no basis for a finding that PFEL would concentrate on such cargoes*” (Rec. Dec., page 17). The majority report gave no indication that it was even aware of the Examiner’s finding, nor any indication as to what evidence made its finding so “apparent” to the majority when the Examiner found there was “no basis” therefor.

As to the majority’s apparent belief that diversion of cargo to outports would result in a proportionately higher diversion of revenue:

(a) Matson’s witness stated (of Honolulu and Hilo, for example), “No, I don’t know that to be a fact” (Tr. 7324).

(b) When Matson serves an outport directly, Matson retains the entire rate paid by the shipper; PFEL, who would charge the same rate, would have to divide that rate with the inter-island transshipping carrier.

(c) Nothing except Matson's own desires prevents Matson from providing outport service by transshipment—unless it be the pressure of Matson's shipper-stockholders.

(d) If in fact PFEL would divert cargo which Matson finds relatively costly to handle, it would result in a proportionate diversion of revenue *less* than the diversion of tonnage, not greater, as the majority found.

(e) Matson carries tremendous volumes of bulk sugar which its witness stated "certainly . . . is a profitable cargo . . ." (Tr. 7325).⁴⁸ Matson is in a far superior competitive position as to sugar because four of the five companies which the Examiner found "run" the sugar industry, are substantial stockholders of Matson (Rec. Dec., pages 8-9). To this extent, the probability is that PFEL would "divert" the less profitable cargoes from Matson and that accordingly, there would be a proportionately less "diversion" of net revenue than of cargo tonnage.

IV. THE MAJORITY ERRED IN FINDING THAT PFEL'S SERVICE WOULD BE PREJUDICIAL TO THE OBJECTS AND POLICY OF THE ACT

It is clear from page 19 of the majority report that the majority's finding of "prejudice to the objects and policy of the Act" was confined to the California/Hawaii service, wherein the majority found Matson was entitled to the protection of an "exclusively" domestic operator, and that PFEL's competition "would seriously jeopardize Matson's vessel replacement program" and therefore would be "unfair" to Matson. Upon these findings, the finding of "prejudice", etc. must stand or fall.

⁴⁸ The Examiner in Docket No. 808 found:

"The returns from the carriage of sugar are very profitable and, in the words of Matson's vice president, 'the sugar not only pays its way, it pays the way of a lot of other things'" (Initial Decision, page 18).

Thus, the finding of "jeopardy" to Matson's vessel replacement program was the majority's crucial finding. Clearly if it was in error both the "unfair competition" and the "prejudice" findings must be set aside.

If the majority erred as to the "unfair competition" finding, the "prejudice" finding must also be set aside, since (1) Matson has stated it does not oppose "fair competition" (its Brief, page 4), and (2) the majority itself found that Matson "should not be protected from free competition" (Report, page 19).

Finally, if the Court finds that the majority erred in its finding that Matson was entitled to the protection of an "exclusively" domestic operator, to the extent of its California/Hawaii operations, the "prejudice" finding, as well as the finding of "unfair competition" must be set aside. Thus, the "prejudice" finding was limited to the California/Hawaii operations and not extended to the Pacific Northwest/Hawaii service. However, the only apparent distinction is that Matson was held to be an "exclusively" domestic operator as to the former, but not as to the latter, requiring the conclusion that the majority likewise would not have found "prejudice" as to the California/Hawaii service except for its conclusion that Matson was an "exclusive" operator in the California/Hawaii trade.

In any event, the majority's findings are so inter-related that the Court could not *assume* the majority would have found "prejudice", etc. absent its other findings.

V. THE MAJORITY ACTION DISCRIMINATED AGAINST PFEL

The majority denied PFEL permission to operate in the Hawaii trade with *non-subsidized* vessels as part of an exclusively domestic service, on the grounds that its operations would constitute "unfair competition" to Matson. But the Board has granted written permission under section 805(a) to two other transpacific carriers to carry

cargo between Pacific Coast ports and Hawaii with *subsidized* vessels, as part of a subsidized voyage in the foreign trade—Pacific Transport Lines, Inc. (see Report, page 7), and Matson's subsidized subsidiary, Oceanic, *supra*. If *subsidized* competition is "fair" it is difficult to see how *unsubsidized* competition is "unfair".

As PFEL urged to the Board (its Petition for Reconsideration, etc., pages 22-23; see also PFEL's Opening Brief, pages 26, 36), denial of such permission to PFEL would discriminate against it. We submit the majority did discriminate against PFEL, without explanation, and thereby erred. PFEL is at least entitled to an explanation as to its contention of discrimination. In *Greensboro-High Point Air Authority v. Civil Aeronautics Board*, *supra*, note 15, this Court was confronted with a very similar situation. In remanding the case to the CAB, this Court stated:

"Despite these considerations, *the fact remains that Greensboro has not received a plain answer to its charge of discrimination. We think it is entitled to one. The issue was flatly raised, and was relevant to the Board's ultimate decision as to what the public convenience and necessity required. The Board's failure to supply an answer was not harmless error, but prejudiced Greensboro's position in its efforts to obtain judicial review. We think the Board should now make appropriate findings of fact on the issue, and state 'the reasons or basis' for its conclusion'*" (231 F.2d at 521-22).

CONCLUSION

PFEL respectfully requests that the Court find that the majority erred in each of the foregoing respects and set aside and annul the Board's report and order served May 14, 1957. PFEL also requests that the Court remand these proceedings to the Board and Administration with a direction that PFEL's application be granted or, in the alternative, that it be reconsidered in a manner consistent with the Court's opinion and findings herein.

Respectfully submitted

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APPENDIX I

Extract From the Merchant Marine Act, 1936, as Amended

"SEC. 805 [46 U.S.C. § 1223]. (a) It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served

by such operation, and without further proceedings as to the competition in such route or trade.

“If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.”

Extracts From the Review Act of 1950

“SEC. 2 [5 U.S.C. § 1032]. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309 (e) and 317 of the Packers and Stockyards Act and section 7 (a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

“Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

* * *

“SEC. 9 [5 U.S.C. 1037]. (a) Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which

the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency."

APPENDIX II

Extract From the Rules of Practice and Procedure, Federal Maritime Board, Maritime Administration

"RULE 3(b) [46 CFR § 201.42] *Public Counsel*. The Assistant General Counsel for Litigation shall be a party to all proceedings governed by the rules in this part, except that in complaint proceedings under § 201.62 he may become a party only upon leave to intervene granted pursuant to § 201.74. The Assistant General Counsel or his representative shall be designated as 'Public Counsel' and shall be served with copies of all papers, pleadings, and documents in every proceeding governed by the rules in this part, whether a party of record or not. Public Counsel shall actively participate in any proceeding to which he is a party, to the extent required in the public interest, subject to the separation of functions required by section 5(c) of the Administrative Procedure Act."

APPENDIX III

Extracts From Examiner Horan's Recommended Decision, Relating to the Need for Service From Stockton, Longview, and Astoria, Compared With the Findings of the Majority of the Board.

STOCKTON

The Examiner's Finding:

"Also, Matson does not offer sufficiently regular service from Stockton. After Stockton had urged the institution of fortnightly service, Matson instituted a

service on a 21-day frequency, which does not meet the needs of shippers. Shippers are still compelled to route their cargo via San Francisco Bay terminals at additional expense to them" (Rec. Dec., page 7).

The Majority's Finding:

"The port of Stockton had asked for fortnightly frequency, and Matson has instituted service on a 21 day frequency. Certain Stockton shippers feel this service does not fully meet their needs" (Report, page 9).

LONGVIEW

The Examiner's Finding:

"Nor does Matson offer the port of Longview general-cargo service, although substantial quantities of general cargo are available there and the port is a terminal port for direct call in other domestic and offshore trades. Service from Longview is needed and has been requested. Matson's vessels serve some lumber docks in the port, and Matson's general-cargo vessels pass within about 400 feet of the Longview general-cargo docks upon sailing from Portland and could make the shift from Portland to Longview with open hatches. Longview's general-cargo shippers must move their traffic through Portland at substantial extra cost" (Rec. Dec., pages 7-8).

The Majority's Finding:

"One shipper indicated a movement of 150 to 250 tons of paper a year from Longview to Hawaii, and 10 to 15 tons would be available for a particular call" (Report, page 9).

ASTORIA

The Examiner's Finding:

"It should also be noted that Astoria, whose outbound dry-cargo traffic in all trades averages 185,000

tons annually, had no service from Matson until the hearing opened, at which time service was instituted on a trial basis. As in the case of Longview, shippers had to bear the substantial extra expense of moving their cargo via Portland. Matson's general-cargo vessels passed within 300 to 600 feet of the public dock at which the Astoria cargo was tendered for carriage, and Matson's vessels could have proceeded from Portland to Astoria with open hatches" (Rec. Dec., page 8).

The Majority's Finding:

"No service had been given by Matson to Astoria until the time of the hearing. The record indicates a movement of 500 tons of flour per month from Astoria to Hawaii, and during the hearing in this proceeding trial service to Astoria was instituted" (Report, page 9).

APPENDIX IV

Extract From the General Report of the Postmaster General to the President (H. Doc. 118, 74th Cong., 1st Sess. (1935)), page 11.

"The liberal treatment accorded to the operators under the ocean-mail contracts has resulted in much waste and extravagance. Too many of the contractors have diverted these grants or subsidies, or by whatever name this aid may be called, to other than sound shipping operations. Many of them have employed lobbyists and special representatives at enormous fees. They have paid high salaries and excessive dividends. In order to pipe these funds away from the mail contracting company, they have organized holding companies, operating companies, terminal companies, agency companies, stevedoring companies, repair companies, towboat companies, and supply companies, thus freezing out independent firms.

"They have also formed corporations to operate inter-coastal and coastwise vessels in competition with nonsub-

sidized American lines, contrary to the spirit of the law, which does not permit the award of mail contracts or subsidies to operators engaged in the coastwise and intercoastal trade. By this means millions of dollars of mail pay has been diverted from use in foreign trade and used to operate in intercoastal and coastwise trade, resulting in unfair competition with nonsubsidized American lines in the same trade. In some cases mail contracts have actually been awarded directly to favored intercoastal and coastwise operators without the necessity of them having to organize subsidiaries to so unfairly compete with other nonsubsidized American lines."

APPENDIX V

Extracts From the Action of the Federal Maritime Board, January 25, 1956¹

"VI. Authorize the continuance, under Section 805(a) of the Act, of the authorization granted in Article 25 of the Operating-Differential Subsidy Agreement awarded Oceanic on December 27, 1937 applicable to the domestic operations of the Matson Navigation Company, so as to continue such operations under the expiration of Contract No. FMB-44, it to be understood that this authorization is not to be construed as expanding or enlarging upon such permissions as were granted Matson and Oceanic under the terms of said Article 25.

"VII. Find and determine that, since the interruptions of service by Oceanic's passenger vessels during and since World War II were beyond the control of the Company, this Operator has continued to hold its "grandfather rights" under Section 805(a) of the Act with respect to its combination cargo-passenger ship operations and that the SSs FREE STATE MARINER and PINE TREE MARINER,

¹ This Appendix reproduces in their entirety extracts furnished to Pacific Far East Line, Inc. by the Secretary of the Board (see footnote 31, *supra*). Those extracts were followed by the typed notation, "Approved by the Federal Maritime Board January 25, 1956."

after conversion, are therefore authorized to engage in domestic service between California and Hawaii in connection with the operation of the combination passenger-freight service on Trade Route 27 to which these two converted vessels will be assigned under Oceanic's new Operating-Differential Subsidy Agreement, Contract No. FMB-44.

"VIII. Authorize the continuance, under Section 805(a) of the Act, of the written permission granted by the former Maritime Commission as a result of the public hearings conducted in 1946 so as to permit Oceanic's subsidized cargo vessels to continue to carry domestic cargoes between the West Coast of the United States and Hawaii in the Trade Route 27 Freight Service under Oceanic's new Operating-Differential Subsidy Agreement, Contract No. FMB-44, it to be understood that this authorization is not to be construed as expanding or enlarging upon such permissions as were granted by the former Maritime Commission and the Federal Maritime Board in connection with the operation of these vessels in the same service under Operating-Differential Subsidy Agreement, Contract No. FMB-14."

APPENDIX VI

Extract From Exceptions of Intervener Matson Navigation Company in FMB Dockets Nos. S-52 and S-55, January 28, 1957.

Appendix VII, page 46.

"Years Required By Matson To Accumulate Down Payment To Replace Pacific Coast Freighter Fleet.

Assumptions Based on Testimony:

1. PFEL limits its Hawaiian cargo to 2500 long tons from Pacific Coast and 4000 tons from Hawaii on 36 voyages per year. (See Matson Brief, p. 120).

2. Cost of replacement fleet for Pacific Coast-Hawaiian freight service—\$100 million.

3. No dividends are paid to stockholders.

**A. Years Required to Accumulate Down Payment to
Replace Matson's Pacific Coast Freighter Fleet.**

Matson's financial data for 1950 to 1954 included in computations:	PFEL Not Permitted to Carry Hawaiian Cargo (Years)	PFEL Permitted to Carry Hawaiian Cargo (Years)
(1) No years eliminated, 1950 to 1954 included	46.4	69.2
(2) 1952 and 1954 eliminated ...	36.8	50.4
(3) 1952 eliminated	40.0	56.8
(4) No years eliminated, 1952 ad- justed to exclude strike ex- pense	44.0	64.4"

APPENDIX VII

**Extract From Statement of Creighton Peet, Jr., Vice President
of Matson Navigation Company and Oceanic Steamship Com-
pany, in Hearings Before the Committee on Merchant Marine
and Fisheries on H. R. 4118 and H. R. 5959 ("Vessel Replace-
ment Program"), May 11, 1955, Pages 87-88.**

"MR. MAILLIARD [Congressman from California]. Do you think Matson is going to be able to replace her [the SS LURLINE, a Matson passenger vessel] when the time comes?

MR. PEET. Certainly not without some kind of assistance. I do not see how we possibly can.

MR. MAILLIARD. Would that also be true of your freighters?

MR. PEET. Yes, definitely.

MR. MAILLIARD. In other words, the Matson Co. is doubtful under present conditions as to whether they can afford to replace their non-subsidized ships when the time comes when they have to replace them?

MR. PEET. It is a very major problem which we are working now.

Just as an example of that, if we had a vessel for a vessel replacement, just for ready reference, we would have to in-

crease our freight rates about 30 percent just to cover the increase in interest and depreciation charges and we do not believe that the economy of the islands of Hawaii could stand such an additional blow.

THE CHAIRMAN. You were not in the Gallery yesterday, were you; the House Gallery?

MR. PEET. No, sir; I was not.

THE CHAIRMAN. If you had been there, you would have heard of the economy of the islands.

Go ahead.

MR. MAILLIARD. That was a very interesting statement. The reason I bring this out is because I am curious to know what the alternative would be. Here you are operating between the mainland of the United States and an overseas territory belonging to the United States. If the economy will not stand a 30 percent increase in rates which would be required for you to profitably replace your fleet when it is necessary, what happens then? Foreign ships are not permitted to make that run?

MR. PEET. No. We are trying to find different types of vessels to carry the products that we have to move. Whether we will be successful in that or not, I do not know, but we are working on various alternate procedures or ships that might at least not minimize but would decrease the burden that we anticipate on a straight vessel-for-vessel replacement.

MR. MAILLIARD. With Matson's other resources besides shipping, it is conceivable that they might decide to get out of that part of the business if they cannot make a living out of it?

MR. PEET. We do not want to do that only as a last resort.

MR. MAILLIARD. What would happen? I presume some way would be found to carry on the trade in Hawaii. Would it be possible that some material from the United States would be shipped to, let us say, Vancouver and then ship it in foreign bottoms from a foreign port?

MR. PEET. That would be a roundabout way to do it but it could be done.

MR. MAILLIARD. It would be almost the only alternative if a United States ship cannot make a go of it?

MR. PEET. Yes.

MR. MAILLIARD. Except if we subsidize them? Are not those about the only alternatives available?

MR. PEET. I think so. There may be other American-flag lines that believe they could do the service and might be willing to try it.

MR. MAILLIARD. I raise this point with some emphasis, Mr. Chairman.

THE CHAIRMAN. It is most interesting.

MR. MAILLIARD. Because everywhere else we are talking about the replacement of ships for those companies that have an obligation to replace them.

Here is a company in a relatively unique position which has no legal obligation and yet is part of this merchant marine which we count on for an emergency.

MR. ALLEN [Congressman from California]. Will you yield?

MR. MAILLIARD. Yes.

MR. ALLEN. In view of that, the ship stops at the island and discharges or picks up passengers. Is there a rebate in connection with the revenue involved?

MR. PEET. Yes, there is.

MR. ALLEN. So even a subsidized line, as to the Hawaiian trade, is no different than Matson?

MR. PEET. I do not want to develop that point too much. There is a penalty for carrying domestic cargo even if they are authorized to do so by the Maritime Board."

**BRIEF FOR RESPONDENTS FEDERAL MARITIME
BOARD, MARITIME ADMINISTRATION, AND
CLARENCE G. MORSE, MARITIME ADMINISTRA-
TOR**

United States Court of Appeals

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
For the
District of Columbia Circuit

FILED FEB 19 1958
No. 14,007

PACIFIC FAR EAST LINE, INC.,

Joseph W. Stewart
CLERK

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD,
MARITIME ADMINISTRATION, AND CLARENCE G. MORSE, MARI-
TIME ADMINISTRATOR, RESPONDENTS.

MATSON NAVIGATION COMPANY, INTERVENER.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL
MARITIME BOARD

E. ROBERT SEAVER,

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Federal Maritime Board,

Maritime Administration, and

Clarence G. Morse, Maritime

Administrator.

No. 14,007

STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court has jurisdiction, under the Review Act of 1950, 5 U.S.C. 1031, *et seq.*, to review the agency report which is the subject of the petition for review in this proceeding.

2. Whether the Federal Maritime Board and Administrator erred in finding, on the merits, that:

- (a) Award of Section 805(a) permission in the instant case would result in unfair competition to a person, firm, or corporation operating exclusively in the coastwise or intercoastal service; or
- (b) Award of Section 805(a) permission in the instant case would be prejudicial to the objects and policy of the Merchant Marine Act, 1936.

3. Whether the report of the Federal Maritime Board and Administrator adequately states their findings and conclusions, as well as the reasons or basis therefor upon all the material issues of fact, law, or discussion presented on the record.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 14,007

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD,
MARITIME ADMINISTRATION, AND CLARENCE G. MORSE, MARI-
TIME ADMINISTRATOR, RESPONDENTS.

MATSON NAVIGATION COMPANY, INTERVENER.

BRIEF FOR RESPONDENTS, FEDERAL MARITIME BOARD,
MARITIME ADMINISTRATION, AND CLARENCE G. MORSE,
MARITIME ADMINISTRATOR

COUNTERSTATEMENT OF THE CASE

Petitioner, Pacific Far East Line, Inc. (hereinafter PFEL), operates a steamship service between California ports and ports in the Far East (T.R. 29), under the terms of an operating-differential subsidy contract entered into with the United States pursuant to the terms of the Merchant Marine Act, 1936 (hereinafter the Act). Section 805(a) of the Act makes it unlawful to award or pay subsidy to any subsidized operator which directly or indirectly shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service without the written permission of the Federal Maritime Board (hereinafter the Board), and further provides that the Board shall not grant any such application if it finds after hearing that the grant of any such permission "will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal serv-

ice or that it would be prejudicial to the objects and policy of this Act * * *." The operating-differential subsidy contract between PFEL and the Board (all subsidy contracts contain the same provision) expressly provides that PFEL surrenders the right to engage in coastwise or intercoastal operations unless it first secures from the Board permission to do so under Section 805(a).

PFEL filed an application which, in part, requested written permission under Section 805(a) to institute a cargo service between ports on the Pacific Coast of the United States and those in Hawaii, the service to be accomplished with unsubsidized cargo vessels in transit from the Pacific Coast to Guam. The Board ordered a hearing to determine whether Section 805(a) was a bar to so much of PFEL's application as requested permission to serve Hawaii. The proceeding was assigned Docket No. S-55 and hearings were held before an Examiner of the Board at San Francisco, Honolulu, and Washington, D. C. The record taken by the Examiner consists of 7,561 pages of testimony and 177 exhibits (Bd. Rept. 3).¹

The Examiner, in a recommended decision served December 19, 1956 (hereinafter Rec. Dec.), concluded that:

(1) The operations of intervener Matson "in the domestic service between the mainland of the United States and Hawaii are covered [i.e., authorized] by Section 805(a) permission" (Rec. Dec. 12);

(2) The California/Hawaii freight service of intervener Matson "is operated exclusively in the coastwise service, and, under Section 805 (a), is entitled to protection from unfair competition" (Rec. Dec. 13);

(3) The "Board should find that the granting of PFEL's application will not result in unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service . . ." (Rec. Dec. 18); and

¹ Part of this record covers the Section 805(a) application of American President Lines, Ltd. (Docket No. S-52), which was consolidated for hearing with PFEL's application. The APL application was withdrawn after the hearing ended (Bd. Rpt. 4).

(4) The "Board should find that the granting of PFEL's application will not . . . be prejudicial to the objects and policy of the Act." (Rec. Dec. 18).

After exceptions to the Examiner's decision had been filed, the Board heard oral argument and thereafter, in a 23-page decision² dated May 10, 1957, found (Bd. Rept. 18-19) that:

1. Matson is an exclusively domestic operator in the California/Hawaii trade;
2. Matson needs the available cargo in this trade, has the capacity to carry such cargo, and, as opposed to PFEL (which is primarily a subsidized offshore operator), is fundamentally entitled to such cargo;
3. The diversion of the volume of cargo which PFEL would carry would seriously jeopardize Matson's vessel replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service;
4. To permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson's exclusively domestic California/Hawaii service; and
5. To permit PFEL to carry cargo in the California/Hawaii trade would be prejudicial to the objects and policy of the Act.

PFEL filed a petition for reconsideration which was denied by the Board on July 30, 1957.

On July 9, 1957, PFEL petitioned this Court to review the Board's report dated May 10, 1957. It contended that "This Court has jurisdiction to review orders of the Federal Maritime Board and Maritime Administration pursuant to 5 U.S.C. § 1032 [the Review Act of 1950]." The Court, on October 11, 1957, ordered that motions to dismiss filed by respondents and intervener Matson "be, and they

² Pages 20 through 23 of the report contain the dissenting opinion of Vice Chairman Guill, which recommends adoption of the findings and conclusions of the Examiner.

are hereby, denied without prejudice to their renewal at the hearing of this case on the merits.”

Respondents herein renew their jurisdictional objection, and incorporate herein by reference their motion to dismiss and supporting memorandum, and their reply to petitioner's answer to motion to dismiss.

STATUTES INVOLVED

The relevant portions of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1101, *et seq.*, the Shipping Act, 1916, as amended, 46 U.S.C. 801, *et seq.*, and the Review Act of 1950, 5 U.S.C. 1031, *et seq.*, are set forth in Appendix A herein.

SUMMARY OF ARGUMENT

I

This Court does not have jurisdiction to review the Board's report. The Review Act of 1950, upon which petitioner relies, expressly limits this Court's jurisdiction in review of Board orders to those entered under the authority of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933. The Merchant Marine Act, 1936, is clearly not a part of the Shipping Act, 1916. The latter, and the Intercoastal Shipping Act, 1933, are purely regulatory; the 1936 Act in contrast is promotional.

The 1936 Act and the 1916 Act have distinct nomenclatures, separate penalty provisions, and basically different subject matters. It is not possible for Congress to have meant to include the 1936 Act when it expressly referred to the 1916 and 1933 Acts in laying down the coverage of the Review Act of 1950.

Moreover, if the Review Act of 1950 were held applicable to Board determinations made under the 1936 Act, any “person aggrieved” would have standing to seek review of such determinations. Execution of the promotional policy of the 1936 Act would be effectively stifled.

The legislative history of the Review Act of 1950 confirms that its provisions were deliberately designed to cover the review of only regulatory Board decisions under the 1916 and 1933 Acts, and not promotional determinations

under the 1936 Act. The chief officials of the then Maritime Commission were careful to propose the precise language that was enacted, so as to avoid the implication that Commission actions taken pursuant to the other statutes which it administered might become reviewable under the 1950 Act.

Since the Courts of Appeals have only the jurisdiction given them by statute, and since no statute vests this Court with jurisdiction to review Board determinations under the 1936 Act, the instant petition should be dismissed.

II

The Board's determination was correct on the merits. It found that to grant the written permission sought by PFEL would (1) result in unfair competition to Matson's exclusively domestic service between Hawaii and California; and (2) be prejudicial to the objects and policy of the Act.

Matson's California/Hawaii service qualifies for protection under Section 805(a). In so determining, the Board recognized that Matson operates other separate and distinct services which are not exclusively domestic. All of the Board's prior decisions on this point have consistently held that a service confined to domestic ports, as is Matson's California/Hawaii service, and sustained wholly by domestic cargo, is "exclusively in the coastwise or intercoastal service" within the meaning of Section 805(a).

PFEL does *not* urge that the phrase "exclusively in the coastwise or intercoastal service" applies only to companies that have no interest in any *foreign* service. Instead, it contends that it applies only to companies that have no interest in any *subsidized* service. This construction is insupportable in logic.

As an exclusively domestic service, Matson's California/Hawaii service would suffer unfair competition if PFEL's application were granted. The Board has consistently held that an exclusively domestic service may not be deprived by subsidized carriers of cargoes which they need, have the capacity to carry, and to which they are fundamentally entitled.

The "fundamentally entitled" doctrine reflects the requirement of Section 805(a) that permissions thereunder be most sparingly granted. In the first place, the language of the section is wholly negative and permission is plainly meant to be the exception rather than the rule. Like other exceptions to remedial statutes, the "written permission" provision of Section 805(a) extends only to carriers plainly within its terms.

In the second place, the legislative history of the 1936 Act discloses that Section 805(a) was designed to be strictly applied in prevention of abuses which had taken place under the earlier Merchant Marine Act, 1928. Perhaps the foremost abuse was the harmful competition suffered by domestic services at the hands of subsidized lines.

In the third place, the Board has consistently in its prior decisions been sparing of permission granted under Section 805(a). The "fundamentally entitled" doctrine was not invoked in this case specially to favor Matson, as implied by petitioner. Indeed, if the Board had departed from it, it would have favored petitioner to the prejudice of other applicants to whom permission has been denied on similar grounds. There was nothing in the record to persuade the Board to abandon the rule of its prior cases.

The "fundamentally entitled" doctrine necessarily resembles an adequacy of service test. Where the domestic line or lines give adequate service and are able and willing themselves to carry the cargo which the applicant would carry, the grant of permission would without more result in unfair competition.

In the instant case the record fully supports the Board's conclusion that the California/Hawaii trade is adequately served by Matson. The consensus of the shipper testimony disclosed that Matson's service has been perfectly satisfactory. A few shippers, although satisfied with Matson's service, advocated competition for its own sake. The policy of Section 805(a), however, discourages rather than promotes competition between a subsidized line and an exclusively domestic service. The record, moreover, shows that Matson has sailed during the period of record with a material proportion of its vessel space unutilized. Accord-

ingly, the Board could not find the service to be inadequate or to require the introduction of a new competitive service.

The Board furthermore found, even apart from the "fundamentally entitled" principle, that PFEL's proposed service would unfairly compete with Matson's California/Hawaii service. Matson is and has been committed to serve all ports in Hawaii, including the less remunerative outports, and all classes of traffic including low-rated traffic, while PFEL proposes to dedicate its ships only partly to the Hawaiian service (and to serve Guam in conjunction with Hawaii), to serve only the one main port of Honolulu, and to accept only limited quantities of cargo for Hawaii rather than full shiploads.

The statistics of record show that PFEL would divert "nearly 10%" of Matson's traffic, and a higher percent of its profits. Speculative future increases in traffic cannot support a different result. Since the Board's denial of PFEL's application is without prejudice to its renewal, PFEL is free to file again, should materially changed circumstances eventuate.

Independently of the issue whether permission would result in unfair competition to an exclusively domestic service, the Board correctly found that the requested permission would be prejudicial to the objects and policy of the 1936 Act. This standard is similar to that applied by the Interstate Commerce Commission in "public convenience and necessity" cases. Under this standard, a new service will not be authorized where, as here, it is unnecessary and will impair the operations of existing carriers. As discussed above, Matson's service is adequate and the additional service of PFEL is both unnecessary and harmful.

PFEL's proposal would, furthermore, be prejudicial to the statutory objective of stimulating the replacement of old vessels with modern vessels constructed in American shipyards. Matson's ships, with an economically useful life of 20 years, will require replacement during 1963-1965. Although Matson, at the time of the hearing, had not yet formulated precise plans for such replacement (it being 8 to 10 years away when this record was made), it is a certainty that the cost of replacement will exceed \$100 million.

The material diversion of traffic which would result from the proposed PFEL service would jeopardize Matson's ability to replace its vessels.

The Board's conclusions—that PFEL's proposed operation would unfairly compete with an exclusively domestic service, and that it would be prejudicial to the objects and policy of the Act—call for an exercise of broad discretion as to which the courts will not substitute their own judgment. In making these determinations, the Board was not required to judge the veracity of conflicting testimony.

The expert judgment required for such determinations is best applied by the responsible administrative agency accustomed to dealing with the problem, rather than by the courts. Consequently, it is well settled that such agency determinations will be upheld if, as here, they have a rational basis and are grounded on substantial evidence in the record. They will not be disturbed even though a reviewing court, if presented with the same problem, might have reached a different conclusion.

III

The Board's report is adequate in every respect.

The Board gave proper weight to the findings of the Examiner. In fact the only material differences between the reports of the Examiner and the Board are confined not to the underlying evidentiary facts, but to the inferential matter of whether the trade is adequately served. In addition, the Board adhered to the "fundamentally entitled" doctrine of its precedent cases, while the Examiner would have departed therefrom. But since the record disclosed no reason to abandon precedent, the Board properly overruled the Examiner in his conclusions.

The Board adequately stated its findings and conclusions, including its reasons for rejecting the Examiner's conclusions. The Board's report contains an explicit statement of its reasoning and of the considerations leading to the result. A greater amount of detail is not required; even in regulatory decisions of the Board (and similarly of the I.C.C.) detailed findings are required only where damages

are awarded. Section 24, Shipping Act, 1916, 46 U.S.C. Section 823.

The Board correctly declined to determine in the instant case whether Oceanic, an affiliate of Matson, had Section 805(a) permission. What was before the Board was the question of PFEL's application to which the alleged unlawfulness of another person's acts was not relevant. In addition, the Board was not required under Section 805(a) to follow the doctrine of the anti-trust laws in furtherance of competition; indeed, the thrust of that section is to discourage rather than to encourage competition between a subsidized line and a wholly domestic service.

Finally, the Board correctly refused to find that denial of PFEL's application would constitute discrimination against PFEL. The situation of PFEL is readily distinguishable from that of Oceanic and of Pacific Transport Lines, the only subsidized carriers to hold permission under Section 805(a) to operate in the California/Hawaii trade. Since there are valid distinctions between them, the Board did not discriminate in treating them differently.

ARGUMENT

I. This Court Does Not Have Jurisdiction to Review the Board's Report.

The Review Act of 1950, 5 U.S.C. 1031, *et seq.*, is the only jurisdictional basis upon which petitioner relies in bringing its suit in this Court. The plain language of that statute shows that it is inapplicable to this case. Section 2 provides in relevant part:

"The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended."

Thus, the jurisdiction of this Court is expressly limited to the review of orders entered under the authority of the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*) and the Inter-coastal Shipping Act, 1933 (46 U.S.C. 843 *et seq.*). Since the agency action here in issue is a determination made in accordance with a section of an entirely different statute, *viz.*, the Merchant Marine Act, 1936, the Review Act of 1950 clearly does not vest this Court with jurisdiction to review it. In *O'Neil Broadcasting Co. v. United States*, 241 F. 2d 443 (C.A.D.C. 1956), this Court made it plain that it will take jurisdiction under the Review Act of 1950 only of cases which come expressly within the scope of that statute.

Petitioner seeks to overcome the fact that the Review Act of 1950 on its face excludes this appeal, by asserting that the Merchant Marine Act, 1936, is "part of the 'Shipping Act, 1916, as amended'," or that the term "Shipping Act, 1916, as amended" is at least ambiguous and requires resort to construction. Petitioner has created a somewhat ingenious but entirely invalid argument to support this position. The net of its argument is that Congress, in drafting the Review Act of 1950, was either oblivious of the 1936 Act, which is the so-called "Magna Carta of American shipping" and perhaps the most important maritime statute on the books, or was somehow unable to find the words that would make precisely plain its intent regarding judicial review thereunder, even though this entailed nothing more than the simple insertion of the term "Merchant Marine Act, 1936."

We show under the two sub-headings below that Congress did not commit such an obvious oversight when it passed the Review Act of 1950, and that there were compelling reasons of public policy for omitting the 1936 Act from the provisions of the Review Act of 1950.

Petitioner is not entitled *under the 1950 Act* to a review in this Court on direct appeal from the agency determination. Whether petitioner has a right to judicial review on any ground is a matter that obviously will be decided, as it should be, in the companion District Court action, and that decision will be subject to appeal to this Court in the regular way.

A. *The 1936 Act Is Neither the Same as Nor Part of the 1916 Act.*

The Merchant Marine Act, 1936, is a promotional and executive statute concerned with establishing and fostering an American merchant marine, chiefly through a comprehensive program of subsidy aid in the construction and operation of ships. On the other hand, the Shipping Act, 1916, and also the Intercoastal Shipping Act, 1933, are regulatory statutes, and it was the aim of the Review Act of 1950 to set up an appropriate procedure for review of such regulatory agency action in lieu of the existing three-judge district court procedure which permitted appeals as of right to the Supreme Court.³

The 1916 and 1936 Acts are different in every major feature. They have distinct nomenclatures. Section 44 of the 1916 Act gives that statute the name "Shipping Act, 1916"; Section 906 of the 1936 Act gives that statute the name "Merchant Marine Act, 1936." Obviously, if the 1936 Act were part of the 1916 Act, it would have been enacted as an amendment to the 1916 Act and labelled as such. It is no accident that this was not done; the two statutes have different names because they have separate purposes. That each act is a separate entity is shown, for example, by Section 807 of the 1936 Act which states, in part:

"It shall be unlawful for any person employed or retained by any shipbuilder or ship operator holding or applying for a contract under the provisions of *this Act . . .* to present, advocate, or oppose any matter within the scope of the *Shipping Act, 1916, as amended, the Merchant Marine Act, 1920, as amended, the Merchant Marine Act, 1928, as amended, the Intercoastal Shipping Act, 1933, or this Act*, before the Congress or any committee thereof, or before the Commission

³ Prior to enactment of the Review Act of 1950, Board orders entered under the authority of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, were reviewed in the same manner as orders of the Interstate Commerce Commission (Sec. 31. Shipping Act, 1916, 46 U.S.C. 830; see also 28 U.S.C. 2284.)

unless such shipbuilder or ship operator shall have previously filed with the Commission . . .”⁴

Congress certainly would not have thus recited the title of each Act, as amended, if it had considered all merchant or shipping legislation to be merely amendatory to the Shipping Act, 1916, as petitioner claims.⁵

Moreover, there are completely separate penalty provisions in the 1916 Act and the 1936 Act. Compare Section 32 of the Shipping Act, 1916, which specifies a fine not to exceed \$5,000 for violation of “any provision of *this [the 1916] Act*” with Section 806(b), the general penalty provision of the 1936 Act, which provides that any natural person guilty of any act or acts “declared in *this [the 1936] Act* to constitute a misdemeanor” shall be fined not more than \$10,000 or imprisoned for from one to five years, and that any corporation “guilty of any act or acts declared in *this Act* to be unlawful shall be punished by a fine of not more than \$25,000.” The establishment by Congress of two separate penalty clauses is clear proof that Congress regarded the two acts to be distinct. To identify them as one, as petitioner seeks to do, would result in the anomaly of having two different penalties for the same action.

In drafting the Review Act of 1950, Congress did not overlook and could not possibly have overlooked the separate identities of the Shipping Act, 1916, and the Merchant Marine Act, 1936. The fact that it made individual reference to “the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended,” shows that it specified the coverage with care. Both of these are regulatory statutes devoted to the same subject matter.

⁴ Emphasis supplied throughout this brief unless otherwise stated.

⁵ Petitioner is at some pains to find justification for its claim that shipping legislation subsequent to the 1916 Act and particularly the 1936 Act is simply amendatory or supplemental of the 1916 Act (petitioner’s answer to motion to dismiss, pp. 4, 5, 10, 11, 16, 17). All that petitioner has found are the miscellaneous formal amendments as to organization and internal administration, which were necessary by reason of the creation of the Maritime Commission in the 1936 Act, none of which have any bearing on the major objectives or substance of either the 1916 or the 1936 Act.

Although they are closely interwoven with each other, Congress did not consider even the 1933 Act a part of the 1916 Act. If, as petitioner urges, the Merchant Marine Act, 1936, was considered a part of the Shipping Act, 1916, then the Intercoastal Shipping Act, 1933, should *a fortiori* have been considered a part of the 1916 Act. In this regard, it is worth noting that the preamble to the Intercoastal Shipping Act, 1933, identifies it as "*An Act Amending the Shipping Act, 1916*, as amended, for the purpose of further regulating common carriers by water" In contrast, the preamble to the Merchant Marine Act, 1936, omits any reference to the Shipping Act, 1916, or to any regulatory objectives. There can, therefore, be no doubt that the draftsmen of the Review Act of 1950 acted with deliberation and meant exactly what they said. They did not intend the term "Shipping Act, 1916, as amended" to include even so closely related a statute as the Intercoastal Shipping Act, 1933, much less so unrelated a statute as the Merchant Marine Act, 1936.

The Review Act of 1950 is so clear and specific on its face that analysis of its underlying policy is unnecessary to clarify it.⁶ In view of petitioner's argument, however, it must be stated that Congress had compelling reasons for omitting the 1936 Act from the review coverage of the 1950 Act. Unlike the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, both of which are regulatory and in many respects similar to the Interstate Commerce Act,⁷ and unlike the other regulatory statutes specified in Section 2 of the Review Act of 1950, the Merchant Marine Act, 1936, calls for promotional and executive determinations, rather than regulatory ones. It vests in the Federal

⁶ See *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 64; *Marmon v. Railroad Retirement Board*, 218 F. 2d 716, 718.

⁷ Although the Shipping Act, 1916, originally contained some limited promotional provisions they were partially repealed by Sec. 2, Merchant Marine Act, 1920, and repealed entirely by Sec. 903(a) of the Merchant Marine Act, 1936, so that the 1916 Act was a purely regulatory statute at the time the Review Act of 1950 was passed. So was the Intercoastal Shipping Act, 1933, which was a purely regulatory statute from its inception.

Maritime Board and Maritime Administrator functions which are fraught with discretion, business judgment, considerations of international and defense policy and other purely executive concerns, and it gives them a large measure of freedom of action to carry out these functions. It is in no sense comparable to statutes which delegate to administrative agencies the power to regulate an industry.

The main business of the Maritime Administrator and Board under the 1936 Act is to determine, award and administer construction and operating subsidies, to the end that an American merchant marine capable of meeting the commercial and defense needs of the nation will be created and fostered.⁸ If the Merchant Marine Act, 1936, had been made subject to the Review Act of 1950, all such determinations by the maritime authority would not only have become reviewable by the courts of appeals but would actually be reviewable on petition of a disappointed subsidy applicant or by any other party "aggrieved" by the agency decision.⁹ As a result the Courts of Appeals would in large measure take over the executive function and it

⁸ Section 601(a) is typical of the kind of agency action which is called for by the 1936 Act. It authorizes and directs the Board "to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels," and it and other provisions of Titles VI and VIII set forth a host of discretionary factors upon which the award and administration of the subsidy contract must depend. The 1936 Act is replete with provisions calling for the exercise of agency discretion. See for other examples Sec. 211(a) (essential trade route determinations), all of Title V (construction subsidy determinations and awards); all of Title VI (operating subsidy determinations and awards); all of Title VII (determinations and awards concerning purchase of vessels by the Government and charter of Government vessels to private parties); Title VIII (to safeguard the Government and certain classes of private parties); all of Title XI (ship mortgage insurance determinations and awards); and all of Title XII (war risk insurance).

⁹ Sec. 4 of the Review Act of 1950 provides: "any party aggrieved by a final order reviewable under this Act, may . . . file in the court of appeals . . . a petition to review such order." Such language has been held to vest standing in even those persons who do not suffer a "legal wrong." *F.C.C. v. Sanders Bros.*, 309 U.S. 470 (1940).

is fair to say that agency promotional action would become a mere preliminary. Congress not only did not intend such an extreme result, it deliberately avoided it by expressly limiting the Review Act of 1950 to "such final orders . . . entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended."

Petitioner's argument that the 1936 Act is subject to the Review Act of 1950, because the 1936 Act is part of the 1916 Act, necessarily includes *all* determinations made under the 1936 Act, and not merely those under Section 805(a), the provision directly involved here. There is nothing which distinguishes agency actions under that section from actions taken under other sections of the 1936 Act. Contrary to petitioner's contention, the fact that the Board in making Section 805(a) determinations takes account of considerations of a "public convenience and necessity" character does not convert that section into a regulatory provision. Board determinations made under Section 805(a), including the one which petitioner seeks herein to review, are a necessary and inseparable part of the discretionary, executive whole created by the 1936 Act. The issue is whether, and to what extent, the Board should waive the subsidized operator's contractual undertaking to keep out of the domestic trade.

In determining whether an operator subsidized to compete with foreign shipping should also be permitted to compete in a domestic trade, the Board is exercising no less a discretionary function than when it decides whether, and under what conditions, it should award a contract for subsidized operations in the first place. In weighing the impact of Section 805(a) permission upon a domestic service, and upon the over-all policy of the Act, the Board gives expression to its political and executive duty to foster the merchant marine. An unsubsidized line is free to enter any domestic trade; but the statute appropriately requires that a subsidized line, under its subsidy contract willingly

executed, must exclusively devote itself to the purpose for which subsidy is paid, namely, competition with foreign lines in foreign commerce, at least unless and until the Board finds it consistent with maritime policy to permit it to invade the domestic trade.

Petitioner itself admits it is doubtful of this Court's jurisdiction, and has therefore filed a suit for review in the United States District Court for the District of Columbia. This appeal under the Review Act of 1950 was apparently brought more for the sake of "insurance" than out of any real belief that this Court's jurisdiction can be founded on the 1950 Act. The District's Court's disposition of the companion suit will be appealable. That is petitioner's proper avenue to this Court.¹⁰ Petitioner cannot expect this Court, whose jurisdiction on direct appeal from the Board's decisions is expressly limited to final orders entered under the authority of the 1916 and 1933 Acts, to rewrite the Review Act of 1950 and to invite appeals from 1936 Act determinations *en masse* by persons "aggrieved".

B. The Legislative History of the Review Act of 1950 Does not Support Petitioner.

Petitioner, in its answer to the motion to dismiss, purports to find support for its argument in the legislative history of the Review Act of 1950, which Act, it says, "is at least ambiguous." Any ambiguity here stems from petitioner's argument, not from the language of the statute, which is plain and specific. There is, therefore, no need to resort to the legislative history.¹¹ The holding of the

¹⁰ All previous suits to review agency actions under sections of the Merchant Marine Act, 1936, which do not specify review procedure, have been brought in the District Court. These are *American President Lines, Ltd. v. Federal Maritime Board*, 133 F. Supp. 100 (D.C. D.C. 1955); *American President Lines, Ltd. v. Federal Maritime Board*, 112 F. Supp. 346 (D.C. D.C. 1953); *Isbrandtsen v. Federal Maritime Board, et al.* (D.C. D.C. Civil No. 1832-56).

¹¹ Petitioner suggests at pages 5-6 of its answer to motion to dismiss that the courts will look beyond the plain meaning of a statute if that meaning "would lead to an unreasonable result 'plainly at

Supreme Court in *Ex Parte Collett*, 337 U.S. 55, 61 (1949), is perfectly suited to this case:

“Petitioner’s chief argument proceeds not from one side or the other of the literal boundaries of §1404(a) but from its legislative history. The short answer is that there is no need to refer to legislative history where the statutory language is clear. ‘The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.’ *Gemasco v. Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions. [*]”

[“*] E.g., *Packard Motor Car Co. v. Labor Board*, 330 U.S. 485, 492 (1947); *United States v. American Trucking Association*, 310 U.S. 534, 543 (1940) and cases there cited.”

But if resorted to, the legislative history does not help petitioner. Nowhere in the legislative history is it suggested that agency actions taken pursuant to the 1936 Act would be reviewable under the Review Act of 1950. Previous bills had contained a clause providing for review of orders entered pursuant to “sections 15, 17, 18, and 19 of the Shipping Act, 1916, as amended . . . and sections 3 and 4 of the Intercoastal Shipping Act, 1933, as amended . . .” Obviously, that language would not provide for review of Board action pursuant to any part of the Merchant

variance with the policy of the legislation as a whole.” In this case, however, not only is the language plain, but the result is reasonable, as we have shown, and is in necessary accord rather than at variance with the remainder of the statute. Section 2 of the Review Act of 1950 limits review of the orders of each of the Government agencies it covers to review of only certain orders of each of the agencies. The limitation of Section 2 to review orders of the Board entered under the two Shipping Acts, thus, is in consonance with the remainder of the statute. Even under petitioner’s theory it is unnecessary to resort to the legislative history in this case.

Marine Act, 1936. At the suggestion of the Maritime Commission the earlier language was changed to read "final orders . . . entered under the authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended . . .," omitting any reference to particular sections of the 1916 Act. As the legislative history cited by petitioner shows (answer to motion, pp. 6-9), this was because the particular sections did not include all provisions of the 1916 and 1933 Acts under which the Board entered regulatory or quasi-judicial orders.¹² The deletion of references to particular sections of the 1916 Act, and the substitution therefor of the title of that Act, could hardly be said to reflect an intention to bring the 1936 Act, a wholly different statute which was not even germane to the subject under consideration, within the scope of the Review Act of 1950.

The testimony by the then Solicitor of the Maritime Commission and a portion of a letter from the Chairman of the Maritime Commission to the subcommittee, which petitioner cites, to the effect that all "reviewable orders" of the Maritime Commission should be covered by the proposed Act, were obviously directed to orders under the 1916 and 1933 Acts, the only Acts mentioned in the predecessor bills. At the time of the hearings there never had been a suit for judicial review of an order issued pursuant to the 1936 Act and such orders were considered by the Chairman and Solicitor to be unreviewable.¹³ In this con-

¹² See Hearings before Subcommittee Nos. 3 and 4 of the Committee on the Judiciary, House of Representatives, on H.R. 1468, H.R. 1470, and H.R. 2271, 80th Congress, and before Subcommittee No. 2 on H.R. 2915 and H.R. 2916, 81st Congress ("Providing for the review of Orders of Certain Agencies, etc."), pp. 137, 145.

¹³ The question of whether and to what extent the courts will review any Board orders entered pursuant to sections of the Merchant Marine Act, 1936, which do not specify a form of judicial review, is unresolved. Judge Holtzoff's ruling in *American President Lines, Ltd. v. Federal Maritime Board*, 112 F. Supp. 346 (D.C. D.C. 1953), that orders issued pursuant to Section 605(c) of the Act are to a limited extent reviewable under the aggrieved party language of Section 10(a) of the Administrative Procedure Act

nection, the Commission Chairman, in a letter to Congressman Hobbs, stated:

“While it is not suggested that this bill can cure all the situations which have been set out, it is submitted that at least in those cases *to which the bill relates (those wherein review of regulatory orders is sought)* the regulatory agencies in general, and the Maritime Commission in particular, should be parties defendant, free to conduct the defense of their own actions in such manner as they may consider proper.”¹⁴

Likewise, the Commission Solicitor urged the Committee to specify the scope of the proposed review statute to include orders entered under all sections of the 1916 and 1933 Acts, including, most importantly, Section 22 of the 1916 Act. That he had no intention of broadening the scope of the proposed legislation to include orders entered under any other statute is conclusively shown by the following telegram:

“Hon. Orie L. Philipps,
Chief Judge, United States Court of Appeals for
the Tenth Circuit,
Denver, Colo.:

“Maritime Commission General Counsel Paul Page proposes amending H.R. 2916 as follows: Page 3, substitute for lines 7 to 12 ‘and also such final orders of the United States Maritime Commission entered *under authority of the Shipping Act, 1916, as amended, or of the Intercoastal Shipping Act, 1933,* as are subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916 (46 U.S.C., sec. 830).’ Maritime Commission prefers not to be included in H.R.

was overruled by *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924, 932 (D.C. Cir. 1955), cert. den., 350 884. Judge Holtzoff’s opinion was confined to the particular case and section of the Act with which he was concerned.

¹⁴ Page 147 of hearings cited in Footnote 12.

2915 because the bill, especially sections 2 and 9 thereof, might be construed to authorize review of actions which shipping acts did not contemplate to be reviewable by the courts. Please advise me your views regarding proposal before hearings Friday, if possible.

“Leland L. Tolman.”¹⁵

Thus the Solicitor, whom petitioner quotes as seeking to make all agency actions judicially reviewable, in fact proposed specific language confining the Review Act's coverage to the 1916 and 1933 Acts. Being fully familiar with these Acts, the Merchant Marine Act, 1936, and other statutes administered by the commission, such as the Merchant Marine Acts of 1920 and 1928 and the Merchant Ship Sales Act of 1946, it is inconceivable that he could have intended the Review Act's coverage to be broader than specified.¹⁶

It is on a slender and strained inference from the Solicitor's testimony before the subcommittee that petitioner would have this Court overrule the plain language of the statute. The fact is that both the Commission's Solicitor and Chairman expressed the desire that the new Act not increase the agency actions subject to review and accordingly recommended legislation limiting review to the two regulatory acts.

Since there is no statutory authority giving this Court jurisdiction to entertain this proceeding, the respondents' motion is well taken and the Court should dismiss the suit. As Mr. Chief Justice Holmes stated in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376 (1940): “The lower federal courts are all courts of limited

¹⁵ *Ibid*, p. 147.

¹⁶ The Solicitor's suggestion as set forth in the telegram was adopted, and the statute as enacted contains precisely his language. His fear as to H.R. 2915 arose out of the broader language of that bill, and again confirms that his proposed language specifically mentioning the 1916 and 1933 Acts was deliberately chosen so as to negate any implication that 1936 Act determinations might be included.

jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Cook v. United States*, 115 F. 2d 463, 464-465 (5 Cir. 1940); *Brown v. Heinen*, 61 F. Supp. 563, 674 (D.C. Minn. 1945).

II. The Board's Determination Was Correct on the Merits.

Section 805(a) forbids the Board to grant permission such as that sought by PFEL unless the Board finds that it will not (1) "result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service" or (2) "be prejudicial to the objects and policy of [the] Act." Thus, even if the Board determines either that there is no exclusively domestic operator in the trade or that award of permission would not result in unfair competition, it still may not grant the permission unless it further finds that the award of permission would not be prejudicial to the objects and policy of the Act. The determination whether the award of permission will be prejudicial to the objects and policy of the Act is independent of whether an exclusively domestic operator is in the trade. In accordance with the preponderance of the evidence, the Board found against PFEL on both grounds.

Petitioner's leading argument, answered elsewhere in this brief, is that the Board erred in these findings, simply because they differed from the Examiner's. Petitioner's brief continues with a grapeshot salvo designed to impute a variety of errors to the Board. But stripped of their window-dressing, petitioner's contentions on the merits of the Board's determination resolved themselves into these points:

i. As to the issue of "unfair competition":

- a. Matson's California/Hawaii service is not exclusively domestic.
- b. Even if it is, PFEL would not unfairly compete with it, because:

- (1) Matson has the advantage in securing cargo.

- (2) Matson's replacement program would not be jeopardized.
 - (3) There will not be a 10 percent diversion of cargo from Matson.
- ii. As to the issue of "prejudicial to the objects and policy of the Act":
- a. If the Board erred on the issue of "unfair competition," it must also have erred on the issue of "prejudicial to the objects and policy of the Act".

Petitioner's argument on every one of these points is without merit.

A. The Board Correctly Found That the Grant of Permission Will Result in Unfair Competition to an Exclusively Coastwise Service.

1. *Matson operates a service exclusively in the coastwise trade and comes within the protection of the statute.* Preliminary to the question of *unfair competition* (but not to the question of prejudice to the objects and policy of the Act) is the question whether the party seeking protection is an operator "exclusively" in the domestic coastwise or intercoastal service. The Board found that Matson's freight service between California and Hawaii was an "exclusively" domestic service entitled to the statutory protection against unfair competition (Bd. Rept. 14).¹⁷ In making this determination, the Board recognized that Matson operated other separate and distinct services which are not exclusively domestic. The Board, however, had long since and consistently held that an exclusively domestic *service* is entitled to protection from unfair competition under Section 805(a) even though it is operated by a company which also provides other separate steamship services that are not exclusively domestic. *American Pres-*

¹⁷ The Examiner, upon whom petitioner relies so heavily, reached the same conclusion (Rec. Dec. 13).

*ident Lines Unsubsidized Operations, Route 17, 3 F.M.B. 457, 470 (1951).*¹⁸

The phrase "will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service" can be read only two ways.¹⁹ Either "exclusively in the coastwise or intercoastal service" relates to *all* the operations of any person, firm, or corporation, so that if the operator of an exclusively domestic service has an interest in a separate service which touches a foreign port, the exclusively domestic service is not entitled to protection from unfair competition, or it applies only to the *particular* service involved, so that any wholly domestic service is entitled to protection from unfair competition even though its owner may have an interest in a separate service which touches foreign ports.

¹⁸ In *American President Lines, Subsidy, Route 17, 4 F.M.B. 488, 500-501 (1954)*, the Board stated:

"Luckenbach charters out to offshore operators, for use in the offshore trades, vessels which it owns but for which there is no demand in the domestic trades. Waterman, in addition to its domestic operations, operates vessels for its own account in the offshore trades. Both Luckenbach and Waterman operate a domestic intercoastal service that does not include foreign ports.

"Luckenbach's standing is destroyed by its offshore charters and Waterman's by its own offshore operations, according to APL. APL's argument as to Luckenbach was rejected by the Board in its consideration of *American President Lines, Ltd.—Sec. 805(a) Application, 4 F.M.B. 436 (1954)*. [Footnote omitted.] In any event, Luckenbach, Waterman, and APL were parties to *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17 supra*, where the Board and Maritime Administrator said, at page 470, that operators engaged 'exclusively' in the intercoastal trade are:

"operators furnishing an intercoastal service that does not include foreign ports.

"Since both Luckenbach and Waterman do furnish such services, they have standing to intervene under Section 805(a) against APL's proposed intercoastal operations."

¹⁹ As noted below, PFEL would construe it in a third, and wholly insupportable way.

The Board has in the past and in the instant case read the statute realistically and followed the latter construction. On the basis of its knowledge of the special needs of the domestic services, the Board regards the protection of Section 805(a) to be necessary for the survival of those services which, without touching any foreign port, are sustained wholly by domestic cargo. Such services require protection whether or not other separate services of the same company serve foreign ports. If "exclusively" were read to relate to all the interests of the owner of the exclusively domestic service, practically no domestic service now in existence would qualify and the unfair competition standard of Section 805(a) would be effectively read out of the statute.

It is essential that PFEL's argument on this point be clearly understood. PFEL concedes that the Board was correct in protecting Luckenbach²⁰ and Waterman from the competition of the applicant in *American President Lines, Subsidy, Route 17*, 4 F.M.B. 488 (1954) (footnote 18, *supra*), although Luckenbach and Waterman admittedly were involved in foreign operations distinct from their domestic services. PFEL thus does *not* contend that "exclusively" domestic applies only to companies that have no interest in any *foreign* service. It contends instead that it applies only to companies that have no interest in any *subsidized* service. But the section does not protect those "operating exclusively *without subsidy*," as PFEL contends; had that been Congress' intention, the statute would so have read. On the contrary, Section 805(a) protects those "operating exclusively in the domestic coastwise or intercoastal service." The opposite of domestic is "foreign," not "subsidized"; thus, a service which is not exclusively domestic is one which is partly *foreign*, not one which is partly *subsidized*. PFEL's proposed reading, covering only those that have no *subsidized* affiliations, is insupportable.

Matson's California/Hawaii freight service qualifies as an "exclusively" domestic service under the Board's read-

²⁰ Luckenbach was represented by the law firm that represents petitioner herein.

ing of Section 805(a), for it is an integral operation confined wholly to domestic ports. A different construction would strip almost every domestic service of the protection afforded it until now by the Board. Matson is therefore entitled to protection from unfair competition.

2. *The permission sought by PFEL would result in unfair competition to Matson's California/Hawaii Service.*

The Board relied on the principle that "A subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry, and to which they are fundamentally entitled" (Bd. Rept. 18). This principle is well grounded in precedent. In *American President Lines—Unsubsidized Operations, Route 17*, 3 F.M.B. 457, 470 (1951), the Board found that Luckenbach Steamship Company "during the most recent period of record (first half of 1949) . . . operated eastbound [in the intercoastal trade] with practically no empty space, while westbound it had on the average 10% unused space," and held, "The record satisfies us that the applicant's westbound carryings on the C-2 Service deprive the regular intercoastal lines of *cargo which they need, have the capacity to carry, and to which they are fundamentally entitled.*" The principle was reiterated by the Board in *American President Lines—Section 805(a) Permission*, 4 F.M.B. 436, 440 (1954), and *American President Lines, Subsidy, Route 17*, 4 F.M.B. 488, 503-4 (1954). In the latter case, the Board found that in 1951 and 1952, Luckenbach, an exclusively domestic operator, had doubled its former bi-weekly service and, even with the extra sailings, "Luckenbach vessels [in 1951 and the first half of 1952] averaged less than four percent free space." The Board then noted that Luckenbach had "extra . . . ships, i.e., ships that are in excess of the ships required to provide weekly sailings . . ." and held:

" . . . But in the face of Congress' special concern for exclusively intercoastal operators and in the face of the importance to the national security and to our domestic commerce of a healthy and vigorous intercoastal water transportation system, we cannot penalize the intercoastal operators by limiting our evalua-

tion of intercoastal capacity solely to those ships which are presently being used on regular schedules.

"Taking into account the apparent potential capacity of the intercoastal operators [including Luckenbach's extra vessels], we conclude that these operators presently have the capacity to carry the cargo available in the intercoastal trades. And in our judgment those operators who provide exclusively intercoastal services are entitled, as against primarily offshore operators such as APL, to whatever intercoastal cargoes they can carry. * * *

* * * * *

"As stated above, in our estimate of intercoastal capacity we include Luckenbach's 'extra' capacity. With this estimate, it is our judgment that eastbound intercoastal operators should have the capacity to carry all the available cargo. Therefore, on the basis of the present record, we conclude that to permit APL to call at San Francisco for eastbound intercoastal cargo would result in unfair competition to exclusively intercoastal operators and would be prejudicial to the objects and policy of the Act."

This principle—that Section 805(a) permission will be denied where the domestic services are themselves operating with substantial unutilized vessel space—is born of hard steamship economics. The domestic services have consistently required special protection.²¹ The Board, charged with the policy of fostering the merchant marine,

²¹ "In adopting the Merchant Marine Act, 1936, Congress manifested a special concern for the protection of coastwise and intercoastal operators, who are not eligible for subsidy, against the competition of subsidized lines (secs. 506, 605(a), 805(a)). The great importance to our merchant marine of its domestic fleet, and the serious difficulties that have attended the reestablishment of domestic shipping in the period since World War II, should prompt us to resolve all doubts against activities of subsidized companies whose operations might tend to impede the development of domestic transportation by sea." *American President Lines Unsubsidized Operations*, Route 17, 3 F.M.B. 457, 470 (1951).

and expert in the specialized field of steamship economics, must give recognition to their special needs.

The Board's adherence to the "fundamentally entitled" doctrine under Section 805(a) reflects the statutory requirement that permissions thereunder be most sparingly granted. This strict application of Section 805(a) is dictated by (1) the language of the statute, (2) the legislative history, and (3) precedent cases.

(1) As to its language, Section 805(a) does *not* state that the Board *shall* grant permission for the subsidized operator to serve the domestic trade once certain findings are made. Rather, it declares it *unlawful* for the Board to "award or pay any subsidy," construction or operating, or to charter any vessel to any operator which itself or through a related company, "directly or indirectly" owns, operates or charters, or owns any pecuniary interest in any person or concern that owns, operates or charters vessels in the domestic trades, "without the written permission" of the Board. The section then provides that the Board "*shall not grant* any such application if [it] . . . finds [after a hearing] that it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or would be prejudicial to the objects and policy of this Act. . . ."

The section is couched in completely negative language, and is written in such comprehensive terms as to prevent any loophole which could prove detrimental to the domestic operator. Thus, the language of the statute itself reflects the intent that every protection be afforded domestic operators and that the standards for granting permission must be strictly applied.

Entry of subsidized operators into domestic trades is permitted only as an *exception* rather than as the rule. Section 805(a) was enacted to remedy the evils of allowing subsidized operators to compete unfairly with domestic operators and of diversion of subsidy funds to the domestic services for which they were intended.²² The "written per-

²² Hearings on S. 3500, S. 4110, S. 4111, 74th Congress, 2d Session, pages 87-89.

mission" provision is an exception to the remedial Section 805(a) and may "extend only to carriers plainly within its terms." *Gregg Cartage Co. v. United States*, 316 U.S. 74, 83 (1942); *McDonald v. Thompson*, 305 U.S. 263, 266 (1938); *Piedmont & Northern Ry. Co. v. I.C.C.*, 286 U.S. 299, 311 (1932).

(2) As to its legislative history, the enactment of the Merchant Marine Act, 1936, stemmed from a message dated March 4, 1935, of the President to Congress, requesting legislation to bolster the nation's merchant marine. H. Doc. No. 118, 74th Congress, 1st Session. The message called for a halt to certain practices and abuses engaged in by American shipping companies operating under the Merchant Marine Act, 1928, which had created the old mail pay system. These practices were spelled out in the report of the Postmaster General, dated January 11, 1935, accompanying the President's message to Congress, and a part of House Document No. 118.

The President and Postmaster General were concerned with (1) the detriment to the Government and its maritime policy resulting from diversion of mail pay funds into enterprises other than the promotion of American-flag carriers in *foreign commerce* in competition with foreign-flag ships and (2) the unfair competition to other American-flag vessels operating in the wholly domestic trades. H. Doc. No. 118, 74th Cong., 1st Sess., p. 18. The latter had been weakened very seriously by such competition.

The President's message stimulated the introduction of several different bills aimed at establishing a complete promotional statute to replace the Merchant Marine Act, 1928. The genesis of Section 805(a) lay in the form of an amendment to one of these bills, S. 2582, proposed on the Senate floor on April 27, 1935, by Senator Black, Chairman of the Special Committee to Investigate Air Mail and Ocean Mail Contracts. (See Sen. Rept. 898, 74th Cong., 1st Sess.) The amendment was as follows:

"SEC. 511a. No contractor under a contract in force under this title, or no holding company of such contractor, or no officer, director, or executive, or no member of the immediate family of any such officers, directors, or executives of such contractor or such holding company shall . . . (3) own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest in any person that owns, charters, or operates any vessel or vessels in domestic intercoastal or coastwise service." 79 Cong. Rec. 6499.

The Black Amendment would have absolutely prohibited *any* domestic operation by a subsidized line. In subsequent bills the prohibition was modified to permit the maritime authority to authorize such operation if found to be required in the public interest and convenience and not to result in unfair competition to exclusively domestic operators.

A late version of this provision, Section 529(b) of S. 3500, was amended to include a grandfather provision, and was explained in part in Senate Report 1721, 74th Congress, 2d Session, April 3, 1936, which accompanied S. 3500, as follows:

"GOVERNMENTAL SAFEGUARDS

* * * * *

"7. Ownership of any interest whatever in the coastwise business is *prohibited*, except that the Authority after public hearing, if it find that the public interest and convenience so require, *may* grant permission to engage in the coastwise trade, if it does not cause unfair competition to any person operating exclusively in the coastwise or intercoastal service. In order to prevent great injustice, a provision similar to that in the Motor Carrier Act is inserted to protect those companies already interested in the coastwise or intercoastal service; . . ." (p. 19).

It was clearly contemplated that, under such a grandfather clause, Oceanic would qualify for subsidy.²³

It is clear that Section 805(a) was broadly intended to exclude subsidized lines from operating, or from holding any pecuniary interest in a line operating, in the domestic trades. Originally an absolute prohibition, it was finally moderated by a provision whereby the Board *could* grant permission under special circumstances; otherwise, only those services which already were in existence, like those of Matson and Oceanic, were to be given permission under the grandfather proviso. The legislative history, and the abuses which the section was aimed at, indicate that Congress desired that applications for permission to operate new services in the domestic trade be only sparingly granted.

(3) As to precedent, the Board has, in fact, always been sparing of permission under Section 805(a). *American President Lines Unsubsidized Operations, Route 17*, 3 F.M.B. 457, 470 (1951) (quoted in footnote 21, *supra*); *American President Lines, Ltd.—Sec. 805(a) Application*, 4 F.M.B. 436, 440 (1954);²⁴ *American President Lines, Ltd.—Subsidy Application*, 4 F.M.B. 488, 504 (1954);²⁵ and *Pacific Far East Line, Inc.—Section 805(a) Application to Act as Agent for Coastwise Line*, 4 F.M.B. 580 (1955).

²³ Oceanic was owned at the time by Matson and American Hawaiian S.S. Company, another intercoastal operator. Without the grandfather rights provision the operations of Oceanic, which had been commended at the hearings by Mr. Peacock, Director of the Shipping Board Bureau and by Senator White (Hearings on S. 3500, S. 4110, S. 4111, 74th Cong., 2d Sess., pp. 78-80), would have been ineligible for subsidy.

²⁴ "In the administration of section 805(a), we are alert to insure that the concern expressed by Congress for the protection of coastwise and intercoastal operators is given full effect . . . We are ready to resolve all doubts in favor of the intercoastal operators in this case. . . ."

²⁵ ". . . in order to carry out the intent of Congress as expressed in section 805(a) [the Board] must be alert to protect coastwise and intercoastal operators against competition from subsidized off-shore operators for cargoes which the intercoastal carriers need, have a capacity to carry, and to which they are entitled."

Certainly the Board did not err in following the "fundamentally entitled" doctrine in this case, nor did it invoke the doctrine specially to favor Matson, as implied by PFEL. The doctrine logically flows from the narrow application required of Section 805(a). Moreover, it has been applied consistently by the Board in prior cases. There was nothing in the record to persuade the Board to abandon precedent and "... radical departures from administrative interpretation consistently followed cannot be made except for most cogent reasons." *WOKO Inc. v. F.C.C.*, 153 F. 2d 623, 631 (D.C. Cir. 1946), rev'd on other grounds, *F.C.C. v. WOKO Inc.*, 329 U.S. 233 (1946). See also *McKay v. Wahlenmair*, 96 App. D.C. 313, 226 F. 2d 35, 40-41 (D.C. Cir. 1955); *N.L.R.B. v. Mall Tool Company*, 119 F. 2d 700, 702 (7 Cir. 1941). A departure from the doctrine would have favored PFEL and prejudiced other applicants to whom permission was denied on similar grounds.

The "fundamentally entitled" doctrine followed by the Board under the strict requirements of Section 805(a) turns necessarily on adequacy of service. If the carriers in the trade are supplying adequate service, and are able and willing themselves to carry the cargo which the applicant would carry, grant of permission would, without more, result in unfair competition.

In the instant case, the Board made detailed findings of fact relating to the question of adequacy:

"There have been occasions when cargo offered to Matson has not been accommodated on a particular vessel, and has had to await the next sailing. Utilization of Matson's sailings outbound have ranged from about 80% in 1950 to about 90% in the first 6 months of 1955. In each year there has been substantial unused underdeck, deck, and reefer space, and there have been times when Matson's cargo vessels were withdrawn due to insufficient cargo. While certain shippers had requested more frequent service and more cargo space

at particular times, the record shows that most shippers are satisfied with the Matson service.”²⁶ (Bd. Rept. 9)

The Board reached the clear and well-reasoned conclusion that the trade was adequately served, as follows:

“The record shows that while certain shippers have indicated that particular cargoes have sometimes been refused for a particular sailing, and that certain shippers desire more service to Stockton and broader port coverage, the record as a whole supports a finding that the great majority of shippers have been adequately served by Matson. Although particular sailings have been full and cargoes have on limited occasions been held for a later sailing, there has been available excess free space on most Matson sailings and vessels have at times been withdrawn from this service for lack of cargoes. The record supports a finding that Matson has had sufficient capacity to adequately serve this trade, and will continue to provide sufficient capacity to meet the needs of this trade in the fore-

²⁶ The Board in its findings expressly considered the testimony of dissatisfied shippers as follows:

“The port of Longview [Washington] has not been served by Matson for General Cargo, although service is provided to lumber docks at Longview. One shipper indicated a movement of 150 to 250 tons of paper a year from Longview to Hawaii, and 10 to 15 tons would be available for a particular call.

“No service has been given by Matson to Astoria [Oregon] until the time of the hearing. The record indicates a movement of 500 tons of flour a month from Astoria to Hawaii and during the hearing in this proceeding trial service to Astoria was instituted. The Port of Stockton has asked for fortnightly frequency and Matson has instituted service on a 21-day frequency. Certain Stockton shippers feel the service does not meet their needs.” (Bd. Rept. 9)

Both Longview and Astoria fall outside of the range of Matson's exclusively domestic California/Hawaii service. The Board Report does not pass on the question whether it would grant permission for a PFEL service which would serve northwest ports without also intruding upon the California/Hawaii trade.

seeable future. The record fails to show the need for service in excess of that presently provided by Matson and other existing operators" (Bd. Rept. 17).

The foregoing findings involve no material question of credibility of testimony, but they do involve the kind of specialized considerations and judgment which an administrative agency is best equipped to apply. If they have support in the record, they must be sustained.

The Board's conclusion as to adequacy was required by the evidence of record. Shippers and consignees, both small and large,²⁷ new and old,²⁸ testified that the service provided by Matson was adequate. Typical of some of the statements made by shippers and consignees are: "The service is all that we could expect of it";²⁹ "Perfectly satisfactory to me";³⁰ "... it has been swell over a quarter of a century";³¹ "I have absolutely no complaint at all, and think the [Matson service] has been excellent."³²

With reference to availability of space, shippers and consignees stated: "We haven't had any trouble getting space from Matson except in those instances where we had waterfront trouble or labor stoppages at the various

²⁷ See testimony of Matson witness John A. McElvoy, MacFarlane Lumber Company, Seattle, Washington, who ships only about a million and a half board feet of lumber per year (Tr. 1787-1819); and B. F. Bolling, Traffic Manager, Pioneer Division, Flintkote Co., Los Angeles, California, who ships asphalt, shingles, roofing and wallboard in amounts of from 75 to 500 tons per vessel (Tr. 1819-1876).

²⁸ See testimony of Joseph B. Stickney, J. B. Stickney & Co., Honolulu, who had only been in business for a year and a half at time of hearing (Tr. 4220-4245); and James Brent Outsen, Partner, Outsen Bros. Milling Co., San Francisco, California, who has been shipping with Matson for over 50 years (Tr. 2661-2675).

²⁹ Testimony of Melvin L. Falk, Assistant General Traffic Manager, Sears, Roebuck & Co., Los Angeles, California (Tr. 1952).

³⁰ Testimony of John A. McElvoy, MacFarlane Lumber Company, Seattle, Washington (Tr. 1792).

³¹ Testimony of Leonard L. Hurst, District Manager of Hawaiian Operations, Western Auto Supply Company (Tr. 5168).

³² Testimony of J. B. Stickney, J. B. Stickney & Co., Honolulu (Tr. 4224).

ports'';³³ and ''We haven't had any difficulty in obtaining space, only during periods of slowdowns.''³⁴

Typical of statements of shippers and consignees who appeared *in support of* PFEL's application are '' . . . I support it [PFEL's application] because I believe in the value, in the public interest of competition. [My company] has no particular criticism of the service routinely rendered by Matson. It has been good service'';³⁵ ''I do believe, however, that competition would very definitely tend to lower freight rates'';³⁶ and ''Well competition seems to have made this country what it is. I think it would be beneficial to all shippers to have it.''³⁷ The primary reason given by these shippers for supporting PFEL's application was not that Matson's service was inadequate, but rather that they thought competition was a good thing.

But so far as rates are concerned, competition is not really relevant. The Board has ratemaking power in the domestic trade, and with or without competition, carriers in the domestic trades may not charge more than a ''just and reasonable'' rate. Section 4, Intercoastal Shipping Act, 1933, 46 U.S.C. Section 845a. Whether or not PFEL enters the trade, Matson cannot fix rates at any level higher than what is needed to provide a fair return on its rate base. And in any case, PFEL proposed to adopt Matson's rate scales (Bd. Rept. p. 6).

Furthermore, competition ''as a matter of principle'', as urged by PFEL and its shipper witnesses, surely cannot justify a grant of Section 805(a) permission. The Act contains no policy to foster competition in domes-

³³ Testimony of B. F. Bolling, *ibid.* (Tr. 1830).

³⁴ Testimony of John Alton Brown, President, Honolulu Distributors, Inc., San Francisco, California (Tr. 1453).

³⁵ Testimony of A. E. Steadman, President, Love's Biscuit and Bread Company, Ltd., Honolulu (Tr. 3783).

³⁶ Testimony of Lorrin B. Thurston, General Manager, Advertiser Publishing Company, Honolulu (Tr. 3932). In fact, PFEL proposed to adhere to Matson's rate scales (Bd. Rept. p. 6).

³⁷ Testimony of William D. Wilke, Traffic Manager, Vegetable Oil Products Co., Inc., Wilmington, California (Tr. 1053).

tic commerce for its own sake, or as these latter witnesses urged, to make it a controlling factor. In fact, Section 805(a) was aimed at *discouraging* competition between a subsidized line and a domestic service. However, any *un-subsidized* carrier is free to enter the domestic trade.

Even in other fields where there is no special statute such as Section 805(a) to inhibit competition, the promotion of competition for its own sake (as urged by PFEL and its shipper witnesses) does not warrant authorizing a new service in a regulated field. In *F.C.C. v. R.C.A.*, 346 U.S. 86 (1953), the Commission, finding that competition is "in the public interest whenever it is 'reasonably feasible'", had authorized a new radiotelegraph service because it regarded the national policy as favoring competition. The Supreme Court rejected the finding of the F.C.C. and held that there was no such national policy, stating:

" . . . Whatever the reasons, they are not for us to weigh; it is for us to recognize that encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest. [p. 93]

* * * * *

"To say that national policy without more suffices for authorization of a competing carrier wherever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress. * * *"
[p. 95] ³⁸

³⁸ In *Clarke v. United States*, 101 F. Supp. 587, 590 (D.C. D.C. 1951), it was held that even when service is provided by only a single carrier, there is no reason to admit a new carrier to the field merely to provide competitive service. This has been the consistent policy of the Interstate Commerce Commission. *Rock Island Motor Transit Company*, 33 M.C.C. 349, 357 (1941); *Brundage Common Carrier Application*, 11 M.C.C. 187, 190 (1939); *Construction of Aroostook Valley R.R.*, 105 I.C.C. 643 (1926); *Consolidated Motor Lines, Inc. Extension of Operations*, 18 M.C.C. 35, 44 (1939).

There were a few shippers in the California/Hawaii trade, as the Board stated in its detailed findings, who did not get precisely the service they demanded, but even they received substantially adequate service, and their residual needs could not support a finding of inadequacy. As the Court held in *Sinett v. United States*, 136 F. Supp. 37, 42 (D.N.J. 1955):

“The Congress has expressed its legislative intent . . . that the Commission through its expertise administration, establish a sound transportation system throughout the nation to meet the needs of the general traveling and shipping public not only today but in the generally foreseeable future. For the commission to indulge the understandable preference and desire of the shipper for day to day personalized service would be contrary to the expressed legislative intent of Congress and would be to jeopardize existing facilities by ruinous competition and ultimately lead to chaos.”

The Board's findings as to Matson's vessel utilization are firmly supported in the record. Exhibit 70 shows that the portion of underdeck space utilized on Matson vessels by general cargo on all California sailings during the period 1949 to 1955 varied from a low of 79% in 1949 to a high of 88% for the first half of 1955. The same exhibit shows that during the same period on all California/Hawaii sailings the percentage of refrigerated space utilized varied from a low of 43% in 1950 to a high of 79% in 1954.³⁹

Exhibit 75 shows that during the period June 1, 1950, to February 2, 1955, Matson vessels were withdrawn from

³⁹ Compare this with the findings in *American President Lines, Ltd.—Unsubsidized Operations, Route 17*, 3 F.M.B. 457, 470 (1951), where the Board found unfair competition to an exclusively intercoastal service which had 10 percent of its space unutilized; and *American President Lines-Subsidy, Route 17*, 4 F.M.B. 488, 503-504 (1954), where the Board found unfair competition to an exclusively intercoastal service which had an average of less than 4 percent of its space unused. In that case, the Board took into consideration “extra” vessels of the domestic operator in reaching a final determination as to adequacy of service, *supra*, pp. 25-26.

the domestic Hawaii service due to insufficient cargo for a total of 1,613 vessel days. The foregoing facts fully support the Board's finding that Matson can adequately serve the trade.

Apart, however, from the "fundamentally entitled" principle, PFEL's proposal would result in unfair competition with Matson. The Board found that the domestic service would suffer unfair competition as follows:

"It is apparent from the record that PFEL would be in a position to concentrate primarily on high-value commodities, and would in effect 'skim the cream' in this trade. PFEL would, in addition, provide direct service to Honolulu only, and service to Hawaiian outports would be provided by transshipment, or by direct call, only if sufficient cargoes offer. In contrast, Matson [is] the primary and historic carrier in this trade, and must continue to provide the necessary, and more costly, direct service to the Hawaiian outports, regardless of the volume of cargoes carried. We therefore feel that although the PFEL competition may divert less than 10% of the tonnage in this trade, the diversion of Matson revenues may be substantially greater. Such diversion of cargoes which otherwise have been moving by Matson would sharply reduce the voyage net proceeds of Matson's sailings in this trade" (Bd. Rept. 17).

PFEL erroneously argues that on the basis of traffic in the last half of 1955 and in 1956 (the latest period of record was the first half of 1955), the Board should have found that the diversion might be somewhat lower than the "nearly 10 percent" found by the Board (Bd. Rept. p. 17).⁴⁰ The Board, however, correctly declined to specu-

⁴⁰ The Examiner implicitly agreed that on the basis of the level of traffic during the period of record (1950-1954, incl.), PFEL would have diverted 10 percent of the cargo, and 31 percent of the voyage gross profit and 68 percent of voyage net profit, but he said "these percentages, however, do not provide a standard for measuring the future effect on Matson . . ." (Rec. Dec. p. 15)

late as to traffic statistics not of record. The denial of PFEL's application was without prejudice to its renewal at any time. Instead of relying upon possible future increases in traffic, PFEL may renew its application should it believe that materially changed circumstances have eventuated to justify a different result.⁴¹

The Board's findings were required by the evidence of record. On the questions of adequacy of service, diversion of Matson's traffic and revenue, and unfair competition, there is no issue of credibility of witnesses, but instead a determination calling for expert judgment in the matter of steamship economics. The Board's judgment, as clearly stated in its report, is that the carrier which historically has served *all* the ports, including the less remunerative out-ports, and *all* classes of traffic, including the less remunerative low-rated traffic, would suffer unfair competition from PFEL, which proposes to dedicate its ships only partly to the Hawaiian service, to serve only the one main port of Honolulu, and to accept only a partial shipload of cargo for Hawaii rather than full shiploads.

Nor can it be argued that because Matson itself wholly owns a subsidized line in the Pacific Coast/Australia, New Zealand trade, i.e., Oceanic Steamship Company, its domestic service will not suffer unfair competition from the proposed PFEL service. The fact is, as the Board found, that Matson has operated its unsubsidized Hawaii Service for 73 years (Bd. Rept., p. 8) and the great preponderance of its activity is that of a carrier in the domestic trade. The Oceanic service is but a small facet of Matson's activity. In contrast, PFEL is, in the great preponderance of its activity, a subsidized line, and its subsidized service would, on any basis of comparison, considerably outweigh its proposed Hawaii service. Matson was in the Hawaii trade for half a century before the 1936 Act was passed,

⁴¹ PFEL contends that the Board erred in failing to reopen the record for more current traffic figures. But "there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening," if cases were to be reopened whenever some new circumstance or new trend is disclosed. *I.C.C. v. Jersey City*, 322 U.S. 503, 514 (1944).

and its entry into and continued service to that trade was in no way made possible by its receipt of benefits under the subsidy provisions of the Act. PFEL, on the other hand, has prospered under the operating subsidy program to the extent that it is now in a position to branch out into the domestic unsubsidized service.⁴² Matson is entitled to protection from a new competitor whose success is attributable to its subsidy benefits under the 1936 Act.

PFEL would disregard the policy of Section 805(a) and have the Board grant permission because Matson would allegedly have an advantage in securing cargo ⁴³ and because, on the basis of possible future increases in traffic, the competition might not suffice to divert as much as 10 percent of Matson's cargo.⁴⁴ But because the proper standard under Section 805(a) is whether the domestic carrier is able and willing to give adequate service, it is enough that the domestic service will be adversely affected; it is not necessary to go so far as to find that it will be destroyed.

The Board's finding that the granting of Section 805(a) permission in this case would be unfair to Matson's exclusively coastwise Pacific Coast/Hawaii service has a rational basis, is supported by substantial evidence in the record, and squarely conforms to the purposes underlying Section 805(a).

B. The Board Correctly Found that the Grant of Permission Would be Prejudicial to the Objects and Policy of the Act.

At the outset, it must be noted that the standard of prejudice to the objects and policy of the Act is separate

⁴² PFEL could have entered the Hawaii trade without restriction before it acquired its subsidy contract on January 1, 1953. PFEL came into being after World War II.

⁴³ The contrary is in fact true. Since PFEL, unlike Matson, would not commit the full reach of its vessels to the Hawaii service (serving Guam also), it is, as the Board found, in a position to accept only the more high-rated cargo, and that which is local to Honolulu and hence most inexpensively delivered.

⁴⁴ PFEL also assails the Board's finding that the grant of permission would jeopardize Matson's replacement program. That point is covered in the next section of this brief.

from the question whether there is an exclusively domestic operator who will suffer unfair competition.

The declaration of policy, Section 101 of the Act, states in pertinent part: "It is necessary for the national defense and development of its foreign and domestic commerce that the United States have a merchant marine . . . (2) sufficient to carry its domestic water borne commerce . . ." This policy erects a standard similar to that of public convenience and necessity.⁴⁵

A further objective, of fundamental importance, is that of stimulating the replacement of obsolescent vessels and the construction of new, modern, defensively and commercially useful ships in American shipyards. The island Territory of Hawaii is dependent upon such ships. These factors must be, and in fact were, considered by the Board in determining whether the objects and policy of the Act would be prejudiced by a grant of Section 805(a) permission in this case.

The federal courts are familiar with and have affirmed the Interstate Commerce Commission's test of public convenience and necessity, which is as follows:

"The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." *Pan-American Bus Lines*, 1 M.C.C. 190, 203 (1936).⁴⁶

⁴⁵ *Pacific Far East Line Application*, 4 F.M.B. 580, 590 (1955). In that case, the Board held, as to application for Section 805(a) permission, that the applicant must *affirmatively* show that the grant of such permission would benefit the objects and policy of the Act.

⁴⁶ The Supreme Court has said in *American Trucking Associations v. United States*, 326 U.S. 77, 83-86 (1945): ". . . the Commission must weigh the advantages of improved rail traffic against the injury

The facts in this case make it plain that the public convenience and necessity are best served by not granting permission to PFEL to operate in the California/Hawaii trade. As discussed above, Matson's service is adequate, and the introduction of PFEL's proposed service would

to the over-the-road motor carriers to determine where public convenience and necessity lies."

See also *Sinett v. United States*, 136 F. Supp. 37, 42 (D.N.J. 1955) (where the court quoted and approved the following statement of the I.C.C.: "In order to maintain an economical and adequate transportation system, existing carriers normally should have the right to transport all traffic which they can handle in an adequate and efficient manner without the additional competition of a new operation. There is no showing here that the services of existing carriers are inadequate in any respect . . ."); *Wilson v. United States*, 114 F. Supp. 814, 819 (W.D. Mo. 1953) ("In the past the Commission has stated in a number of cases before it that 'in order to foster a sound transportation system, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them as against any person now seeking to enter the field of motor carrier transportation in circumstances such as are here disclosed.' [citations omitted.] In the expertise of the Commission, we believe it to be authorized and empowered under the I.C.C. Act to so define the issue to be resolved on an application such as here involved. We accept such as being the legal issue before the Commission, and in this review proceeding shall confine our consideration as to whether that issue as resolved by the Commission is supported by substantial evidence").

In *Clarke v. United States*, 101 F. Supp. 587, 590 (D.C. D.C. 1951), the Court through an opinion by Judge Prettyman stated: "Discussion of the controversy should proceed from certain basic principles of public utility regulatory law. The first such principle is that, if there be traffic enough for only one carrier, only one carrier will be certificated. * * * Only if there be traffic enough to support efficient operation by more than one carrier does the public interest (require) the competitive operation of two carriers." See *Hudson Transit Lines v. United States*, 82 F. Supp. 153, 157 (S.D. N.Y. 1948), aff'd 338 U.S. 802 (" . . . there must be an affirmative showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and that the latter element includes a showing the present facilities are inadequate. * * * The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service.")

divert substantial traffic and adversely affect the domestic carrier.

PFEL's proposal would furthermore be inconsistent with the Act's fundamental purpose of encouraging the replacement of obsolete vessels with modern ones built in American shipyards.

As PFEL itself concedes (Bd. Rept., p. 39), the useful economic life of an ocean going vessel is approximately 20 years. The Matson vessels, built between 1943 and 1945, will require replacement during 1963-1965. Notwithstanding the fact that the problem was still 8 to 10 years away at the time of the hearing, Matson had already instituted "a program for studying the situation, to determine what type of ships, what the service requirements will be" (Tr. 2777). It is immaterial that the program had not been worked out in detail; the incontrovertible and material fact is that replacement will inevitably become necessary.

Moreover, the record establishes that the cost of replacement will exceed \$100,000,000. The Board's findings to this effect (p. 17) derives not alone from the fact that one of its major responsibilities is the maintenance and study of current information on shipbuilding costs. It is also based on the uncontradicted testimony that at prices prevalent at the time of the testimony (they have since risen appreciably), the cost of replacement would run to six to eight times the original price of the vessels, or \$120,000,000 to \$160,000,000 (Tr. 2783-5; Ex. 3, Item 6). The Board's finding that it will be "at least \$100,000,000" is thus fully supported by the record; indeed, it is quite conservative, being considerably below the probable cost of a vessel replacement program for Matson.

In view of these facts, the Board was required to conclude that since PFEL's proposed operation would materially divert traffic and hence earnings from Matson, it would in consequence "jeopardize"—i.e., imperil—Matson's ability to replace its vessels.

The Hawaiian economy is vitally dependent on ocean transportation to and from the Pacific Coast. Since the trade depends so greatly upon Matson's service, the

Hawaiian economy could be endangered should Matson's service be seriously affected (Bd. Rept. 16-19). The record supports the conclusion that the grant of permission would have an adverse effect on Matson's service, which already adequately serves the California/Hawaii trade.

The Board correctly found that the grant of permission to PFEL would be prejudicial to the purposes and policy of the 1936 Act.

C. Section 805(a) Calls for an Exercise of Broad Discretion, as to Which the Courts Will Not Substitute Their Own Judgment.

Even with respect to review of I.C.C. determinations of public convenience and necessity,⁴⁷ almost innumerable court decisions have held (1) that the agency has broad discretionary authority to weigh and determine the public interest, and (2) that the findings of the agency will be upheld if they have a rational basis and are grounded on substantial evidence in the record even though the court disagrees with the decision.

As to the first standard, the Supreme Court in *United States v. Detroit Navigation Co.*, 326 U.S. 236, 241 (1945), stated the rule as follows:

"* * * The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity should be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority, *I.C.C. v. Parker*, 326 U.S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies."

⁴⁷ Under section 805(a), the Board is presented with questions involving proprietary and executive considerations. A grant of permission is, in effect, a waiver by the Government of the operator's contractual undertaking to stay out of the domestic trades.

In *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-536 (1946), the Supreme Court in reversing a decision of a district court which had remanded an order of the I.C.C. held:

"We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '... the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for which the Commission had done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." ⁴⁸

The second principle, i.e., that the findings of the agency must be upheld if they have a rational basis and are grounded on substantial evidence in the record, is virtually a truism.⁴⁹

⁴⁸ In *Capital Transit Company v. United States*, 97 F. Supp. 614, 619 (D.C. D.C. 1951), the District Court for the District of Columbia, in an opinion by Judge Washington, held that the Administrative Procedure Act has not changed the scope of review principle set forth in the *Pierce Auto* case.

The principle that the agency's discretion will not be interfered with by the courts has of course been applied to the field of ocean shipping. *Far East Conference v. United States*, 342 U.S. 570 (1952); *Swayne & Hoyt v. United States*, 300 U.S. 297, 304 (1937); and *U. S. Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932).

⁴⁹ The typical I.C.C. cases in support of this point are *Schaffer Transportation Company v. United States*, 355 U.S. 83 (1957); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 536 (1946);

In the instant case, both principles clearly call for the affirmation of the Board's determination.

III. The Board's Report Is Adequate in Every Respect.

In addition to arguing that the Board erred in its conclusions on the merits, PFEL also contends that the Board decision is deficient as to form. PFEL's contentions are that the Board erred in failing to attach weight to some of the findings of the Examiner (PFEL Br. 9-18); that the Board erred in failing to give an adequate statement of its findings and conclusions, including its reasons for rejecting some of the Examiner's findings (PFEL Br. 9-18); that the Board erred in not discussing the issues of whether Oceanic, Matson's subsidiary, had received 805(a) permission covering Matson's domestic operations and whether Matson's operations were in violation of the anti-trust laws (PFEL Br. 18-23); and that the Board erred in not finding that refusal to grant PFEL permission to operate in the Pacific Coast/Hawaii trade would constitute discrimination against PFEL as compared with subsidized operators which have been granted such permission (PFEL Br. 46-47).

We show below that none of these arguments has merit.

A. *The Board gave proper weight to the findings of the Examiner.* The Board noted the ultimate conclusions and recommendations of the Examiner and then stated that it did not agree with them (Bd. Rept. 4). The Board then made detailed findings of fact, which except with respect to a few readily recognizable matters, were the same as those of the Examiner. The Board expressly summarized the arguments of the parties, and went on to state its discussion and conclusions, carefully explaining its reasoning.

Mississippi Valley Barge Lines Company v. United States, 292 U.S. 282, 286-287 (1934); *Luckenbach S.S. Co. v. United States*, 122 F. Supp. 824, 828 (S.D. N.Y. 1954), aff'd. 347 U.S. 984; and *Newter S.S. Corp. v. United States*, 107 F. Supp. 388 (S.D. N.Y. 1952), aff'd. 344 U.S. 901 (1952). Decisions affirming this principle in other fields are *O'Leary v Brown-Pacific-Maxon*, 340 U.S. 504, 508-509 (1951); *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 207 (1947); *Labor Board v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1941); and *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 146 (1939).

The material differences between the reports of the Examiner and the Board are: (1) The Examiner rejects the doctrine that exclusively domestic carriers are fundamentally entitled to traffic which they are able and willing to serve adequately (Rec. Dec. 14-15), whereas the Board accepts this doctrine; and (2) the Examiner finds that service between California and Hawaii has been inadequate (Rec. Dec. 16), whereas the Board finds that it has been adequate. If the Examiner had accepted the "fundamentally entitled" doctrine and found adequacy of service, his conclusion would necessarily have been the same as the Board's.

As to the first difference, the Board and not the Examiner must decide whether doctrines set forth in precedent cases should be rejected,⁵⁰ and even the Board may reject them only "for most cogent reasons." *WOKO v. F.C.C.*, 83 App. D.C. 33, 153 F.2d 623, 631 (D.C. Cir. 1946) (rev'd on other grounds, 329 U.S. 233).

The second difference is caused by the fact that the Examiner relied solely on Matson's vessel utilization in the first six months of 1955 (Rec. Dec. 16), whereas the Board took into account Matson's vessel utilization for the entire period covered by the evidence taken at the hearing. Further, the Examiner found inadequacy of service, based on the complaints of shipper witnesses that 21-day frequency of service to the Port of Stockton was insufficient, and on his belief that Longview, Washington, and Astoria, Oregon,⁵¹ do not receive adequate general cargo service (Longview and Astoria are outside the range of Matson's California/Hawaii service, but within the range of its Pacific Northwest/Hawaii service),⁵² and that there were times when

⁵⁰ *Insurance Agents' International Union*, 103 N.L.R.B. (Dec. 13, 1957).

⁵¹ The Examiner found, however, that Matson had instituted service to Astoria on a trial basis at the time of the hearing (Rec. Dec. 8). The record does not show that Astoria and Longview generate enough traffic to warrant more service than they now receive.

⁵² The Board left open the question of whether it would grant Section 805(a) permission for a Pacific Northwest/Hawaii service if such application were submitted by PFEL (Bd. Rept. 19).

Matson could not accommodate cargo on some of its voyages (Rec. Dec. 7-8; 16). The Board, for compelling reasons which we have shown, felt that the total testimony of all shipper witnesses, together with Matson's record of vessel utilization and profits for the period 1950 through the last six months of 1955 could not support a finding of inadequacy.

The ultimate determination whether a particular service is adequate, especially where the underlying evidentiary facts are not in serious dispute, must be made by the Board, and it is peculiarly within the Board's own competence. The Board "is not bound to accept its examiner's findings and may, as here, reject his recommendations and reach different conclusions. In fact, the Commission [Board in this case] is the body charged with the responsibility of decision and is not only at liberty but is required to reach its own conclusions upon the evidence. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285-286 . . . , *Norfolk Southern Bus Corp. v. United States*, 96 F. Supp. 758." *Sinnett v. United States*, 136 F. Supp. 37, 40 D.N.J. 1955). To hold otherwise makes the Board's decision a rubber stamp process. See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951); *N.L.R.B. v. Universal Camera Corp.*, 190 F. 2d 429, 432 (2 Cir. 1951) (where Judge Frank on remand from the Supreme Court held: "The Board, however is not bound by the examiner's 'secondary inferences' or 'derivative inferences', i.e., facts to which no witness orally testified but which the examiner inferred from facts orally testified by witnesses whom the examiner believed. The Board may reach its own 'secondary inferences' and we must abide by them unless they are irrational"); *F.C.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955) ("The Court of Appeals' conclusion of error as to evasiveness relies largely on its understanding that the Examiner's findings based on demeanor of a witness are not to be overruled by a Board without a 'very substantial preponderance in the testimony as recorded', . . . We think this attitude goes too far"); *Bond Crown &*

Cork Co. v. Federal Trade Commission, 176 F. 2d 974, 979 (4 Cir. 1949).⁵³

B. *The Board gave adequate statement of its findings and conclusions, including its reasons for rejecting the Examiner's findings.* As we have pointed out previously, in our discussion of the correctness of the Board's findings on the merits in this case, *supra*, pp. 21-43, the Board set forth not only basic, but detailed findings in support of its order. This is, in fact, more than the Board is required to do under applicable law covering agency decisions, both before and after the Administrative Procedure Act.⁵⁴ The courts have

⁵³ In the instant case the Board's findings are based on evidence in the record and it is, therefore, clearly distinguishable from *In the Matter of United Corporation*, 249 F. 2d 168, 180-181 (3 Cir. 1957) upon which petitioner places its principal reliance. There the Court rejected the findings of the S.E.C. in favor of the findings of its Examiner on the question of compensable service after finding "All that the Commission did, as appears from its opinion, was to shoot an arrow into the sky and pick a 'package' of fee and expenses of \$50,000 with no further explanation as to how it arrived at the sum than to say: ' . . . although we cannot accept the computation by which United arrived at the \$50,000 . . . its over-all judgment in agreeing to an allowance in that amount is entitled to weight, and that has been one of the factors leading us to our ultimate conclusion.' Nowhere in its opinion did the Commission set forth the basis of its allowance to Phillips or any standard or method of valuation of his services or disbursements."

⁵⁴ Petitioner argues that the Section 8(b) of the A.P.A. requires the Board to give reasons for rejecting any of the Examiner's findings (PFEL Br. 11). This is not so. Section 8(b) provides only that the record shall show the ruling on each proposed finding or conclusion of the parties or exceptions by the parties to the Examiner's decision.

The Board, in fact, did make findings upon all proposed findings and all exceptions of the parties which related to material issues supported by the record. As to other findings or exceptions, the Board stated:

"Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been found not related to the material issues or not supported by the record."

A similar summary ruling by the N.L.R.B. was endorsed by the Court in *N.L.R.B. v. Sharples Chemicals, Inc.*, 209 F. 2d 645, 652

repeatedly held that administrative agencies are not required to set forth detailed findings. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 529 (1946). (If the Commission's report contains all the essential findings required each finding need not be annotated with the evidence supporting it); *Newtex S.S. Corp. v. United States*, 107 F. Supp. 388, 389 (S.D. N.Y. 1952), aff'd 344 U.S. 901 (1952); *Capital Transit Co. v. United States*, 97 F. Supp. 614, 621 (D.C. D.C. 1951); *Sinett v. United States*, 136 F. Supp. 37, 42 (D.N.J. 1955) (where the court said it was sufficient that the "Commission found that opposing carriers could provide adequate facilities, transport the commodity and supply reasonable transportation needs not served by the applicant . . ."); *Luckenbach S.S. Co. v. United States*, 122 F. Supp. 824 (S.D. N.Y. 1954), aff'd 347 U.S. 984.

The standard of specificity required of the I.C.C. in its regulatory decisions is at least as demanding as that required of the Board in its 805(a) determinations. Yet in *Alabama Great Southern R. Co. v. United States*, 340 U.S. 216, 227 (1951), the Supreme Court held:

"As to the contention of appellants that the Commission's order is not supported by essential findings of fact, § 14(1) of the Interstate Commerce Act, 49 U.S.C. § 14(1), 49 U.S.C.A. § 14(1), does not require the Commission to make detailed findings of fact except in a case where damages are awarded. *Manufacturers' R. Co. v. United States*, 246 U.S. 457, 487, 489-490, 38 S.Ct. 383, 391, 392, 62 L.Ed. 831. The statute requires the Commission only to file a written report, stating its

(6 Cir. 1954) (" . . . we see no objection to including all 53 rulings in one sentence instead of 53 separate sentences."). In *Radio Station KFH Co. v. F.C.C.*, 274 F. 2d 570 (D.C. Cir., 1957), cited by petitioner, this Court noted the *Sharples* case and did not take issue with it, but stated that in the *Sharples* case the N.L.R.B. had stated its reasons with enough particularity to enable the Court satisfactorily to review its decision, while this was not done by the F.C.C. in the *Station KFH* case. As we have shown, the basis of the Board's decision in the instant case is clearly set forth in the report and a separate ruling on each proposed finding, or exception would be a bootless gesture which would make for an inordinately long, but no more intelligible, report.

conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report. Of course § 14(1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order. *State of Florida v. United States*, 282 U.S. 194, 215, 51 S.Ct. 119, 125, 75 L.Ed. 291; *United States v. Baltimore & O.R. Co.*, 293 U.S. 454, 464-465, 55 S.Ct. 268, 272-273, 79 L.Ed. 587. And the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. E.g., *United States v. Pierce Auto [Freight] Lines*, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed 821; *State of North Carolina v. United States*, 325 U.S. 507, 65 S.Ct. 1260, 89 L.Ed. 1760; *City of Yonkers v. United States*, 320 U.S. 685, 64 S.Ct. 327, 88 L.Ed. 400; *United States v. Carolina [Freight] Carriers Corp.*, 315 U.S. 475, 62 S.Ct. 722, 86 L.Ed. 971. *Here the Commission found, in conformity to the statute invoked, supra note 2, that the differentials prescribed are 'justified as reasonable' and 'necessary and desirable in the public interest.' And 'the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data * * *.'* *United States v. [State of] Louisiana*, 290 U.S. 70, 80, 54, S.Ct. 28, 33, 78 L.Ed. 181. Enough has been 'put of record to enable us to perform the limited task which is ours.' *Eastern-Central [Motor Carriers] Ass'n v. United States*, 321 U.S. 194, 212, 64 S.Ct. 499, 508, 88 L.Ed 668." ⁵⁵

⁵⁵ Section 14(1) of the Interstate Commerce Act, requiring detailed findings by the I.C.C. only where damages are awarded, has an almost identical counterpart in Section 24, Shipping Act, 1916, 46 U.S.C. Sec. 823. Thus, the Board, in its regulatory actions, is held to the same standard as the I.C.C. But in its executive and promotional actions under the 1936 Act, such as 805(a) determinations, the Board is not subject even to such a limited requirement. Even if it were, however, the instant decision would be more than adequate for the purposes of judicial review, i.e., "to enable us [the Court] to perform the limited task which is ours."

See also *Southern Kansas Greyhound Lines v. United States*, 134 F. Supp. 502, 506-509 (W.D. Mo. 1955) (opinion by Judge Whitaker) aff'd 351 U.S. 921; *Luckenbach S.S. Co. v. United States*, 122 F. Supp. 824 (S.D.N.Y. 1954) (opinion by Judge Augustus Hand) aff'd 347 U.S. 984. These cases undoubtedly support the proposition that the Board report, even if reviewable, cannot be set aside for lack of such exhaustively detailed findings as petitioner would desire.

C. *The Board was correct in not considering whether Oceanic had Section 805(a) permission with respect to Matson's domestic operations and gave sufficient weight to the anti-trust implications of Matson's operations.* The Board correctly held that "The status of Oceanic's permission with respect to Matson's domestic service is irrelevant to the question of whether Matson is operating 'exclusively in the domestic coastwise or inter-coastal trade.'" (Bd. Rept. 15) ⁵⁶

The Board has continuing jurisdiction concerning the status of Oceanic's permission, and if it should be necessary at any time to determine whether such permission is deficient, it can readily do so in another proceeding directed to that purpose. The merits of PFEL's application cannot be made to depend upon the alleged unlawfulness of another person's acts. See *Southern Kansas Greyhound Lines v. United States*, 134 F. Supp. 502, 510-511 (W.D. Mo. 1955), aff'd 351 U.S. 921; *Florida Economic and Advisory Council v. F.P.C.*, — App. D.C., — F. 2d — (D.C. Cir., December 1957) (where this Court decided that the lawfulness of applicant's rates need not be tested in a certificate of convenience and necessity proceeding); *Capital Transit Company v. United States*, 97 F. Supp. 614, 621 (D.C.D.C. 1951).

⁵⁶ The Examiner, upon whom PFEL places such great reliance in other respects, had concluded "that Matson's operations in the domestic service between the mainland of the United States and Hawaii is covered by Section 805(a) permission" (Rec. Dec. 12). The finding is manifestly correct. Matson holds grandfather rights under Section 805(a), having continuously operated in the Hawaii trade for some 50 years prior to the 1936 Act.

As to the anti-trust implications of Matson's operations, the Board fully considered the corporate relationships of Matson (Bd. Rept. 10), although it is not required under Section 805(a) to go so far. The Merchant Marine Act, 1936, does not include a policy favoring competition; its thrust is, in fact, to discourage competition between a domestic service and a subsidized one. Moreover, "That there is a national policy favoring competition cannot be maintained today without careful qualifications." *F.C.C. v. R.C.A. Communications, Inc.*, 346 U.S. 86, 91-93 (1953). These qualifications especially apply to an industry regulated under a special statutory scheme, such as shipping. *F.C.C. v. R.C.A. Communications, Inc.*, 346 U.S. 86, 91-93 (1953).

D. *The Board correctly refused to find that denial of PFEL's application would constitute discrimination against PFEL.* The Board has long adhered to the principle that Section 805(a) permission will be denied where a domestic service, capable of adequately serving the trade, opposes the grant of such permission. On this ground, the Board has denied other applications. See *American President Lines*, 4 F.M.B. 488, 503-504 (1954); *American President Lines*, 3 F.M.B. 457, 470 (1951). The Board, in the instant case, adhered to the standard upon which earlier applications have been decided; and, contrary to petitioner's contention, the Board, far from discriminating against PFEL, has treated PFEL consistently with its treatment of other applicants. The fact is, that had the Board granted PFEL's application, it would have discriminated in the latter's favor.

The only subsidized line, other than Oceanic,⁵⁷ to hold Section 805(a) permission to operate in the Hawaii trade is Pacific Transport Lines (PTL). That carrier was given Section 805(a) permission in *Pacific Transport Lines Application*, 4 F.M.B. 146 (1953), and its application is readily distinguishable in several material respects from the pres-

⁵⁷ Oceanic operates in the Hawaii trade under grandfather rights acquired by reason of its continuous operation since long prior to the 1936 Act.

ent one of PFEL. In the first place, PTL had been regularly serving the Hawaii trade for a considerable period of time prior to becoming a subsidized service; it sought permission only for the *continuation* of an established Hawaii service. In contrast, PFEL, already a subsidized carrier, seeks now to *inaugurate* a Hawaii service. In the second place, Matson, the domestic carrier against whom the competition of PTL would have been directed, did not oppose the application. In the third place, PTL's Hawaii service was limited in scope. And in the fourth place, as an already existing service in the Hawaii trade, PTL had cultivated the custom of shippers who relied upon PTL's rounded service combining Hawaii and Far East calls on the same voyage. (4 F.M.B., at p. 149.) The application of PFEL is different on all these grounds.

Petitioner cites *Greensboro-High Point v. C.A.B.*, 231 F. 2d 517, 521, 97 App. D. C. 358 (1956), for the proposition that the Board was under some duty to pass expressly on the question whether PFEL was being discriminated against. In the *Greensboro-High Point* case, the issue involved was whether the C.A.B. properly awarded service to one locality while denying it to another, and this Court held properly that the issue of discrimination, "flatly raised" before the C.A.B., "was relevant to the Board's ultimate decision as to what the public convenience and necessity required" (231 F. 2d at pp. 521-522, 97 App. D. C. at pp. 362-363). The instant case, however, involves no award of service as between different localities; it involves the question only whether a particular applicant for a particular waiver of a contractual and statutory provision has sufficiently justified its request.

The Board did not err in omitting from its report a discussion of whether PFEL was being discriminated against.

CONCLUSION

Because the Review Act of 1950 does not apply to Board orders entered under the authority of the Merchant Marine Act, 1936, this Court lacks jurisdiction to entertain the petition. However, even if jurisdiction existed, the Board's decision is correct on its merits and would require affirmance.

Respectfully submitted,

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Washington 25, D. C.

FEBRUARY 7, 1958

APPENDIX A

STATUTES INVOLVED

A. Selected provisions of the Merchant Marine Act, 1936, as amended.

SEC. 805 [46 U.S.C. 1223] (a) It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly, or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant

such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

SEC. 601. (a) [46 U.S.C. 1171] The Commission is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States. No such application shall be approved by the Commission unless it determines that (1) the operation of such vessel or vessels in such service, route, or line is required to meet foreign-flag competition and to promote the foreign commerce of the United States, and that such vessel or vessels were built in the United States, or have been documented under the laws of the United States not later than February 1, 1928, or actually ordered and under construction for the account of citizens of the United States prior to such date; (2) the applicant owns, or can and will build or purchase, a vessel or vessels of the size, type, speed, and number, and with the proper equipment required to enable him to operate and maintain the service, route, or line, in such manner as may be necessary to meet competitive conditions, and to promote foreign commerce; (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations of the vessel or vessels as to meet competitive conditions and promote foreign commerce; (4) the granting of the aid applied for is necessary to place the proposed operations of the vessel or vessels

on a parity with those of foreign competitors, and is reasonably calculated to carry out effectively the purposes and policy of this Act.

B. Selected provisions of the Shipping Act, 1916, as amended.

SEC. 24. [46 U.S.C. 823] That the board shall enter of record a written report of every investigation made under this Act in which a hearing has been held, stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The board may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, Districts, and possessions thereof.

SEC. 31. [46 U.S.C. 830] That the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

C. Selected provisions of the Review Act of 1950.

SEC. 2. [5 U.S.C. 1032] The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402(a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except

orders issued under sections 309 (e) and 317 of the Packers and Stockyards Act and section 7 (a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

SEC. 4. [5 U.S.C. 1034] Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

3

**BRIEF FOR RESPONDENT UNITED STATES OF
AMERICA**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14007

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

**UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ET AL.,
RESPONDENTS**

**ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL
MARITIME BOARD AND THE MARITIME ADMINISTRATOR**

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United States Court of Appeals

For the

District of Columbia Circuit

FILED

FEB - 7 1958

Joseph W. Stewart

CLERK

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The stipulated issues which respondent United States of America will discuss are as follows:

1. Whether the Federal Maritime Board and Maritime Administrator erred in finding that the granting of section 805 (a) permission sought by Pacific Far East Line, Inc., would result in unfair competition to Matson in its exclusively domestic service.

2. Whether the Federal Maritime Board and Maritime Administrator erred in finding that the granting of section 805 (a) permission sought by Pacific Far East Line, Inc. would be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

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*ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL
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BRIEF FOR RESPONDENT UNITED STATES OF AMERICA

COUNTERSTATEMENT OF THE CASE

This is a petition to review an order of the Federal Maritime Board and the Maritime Administrator,¹ entered under Section 805 (a) of the Merchant Marine Act, 1936, 46 U. S. C. 1223, denying petitioner's application for its unsubsidized vessels to operate in the Pacific Coast-Hawaii trade.

Section 805 (a) makes it unlawful, without the Board's written permission, to pay any subsidy to any person who owns, operates, or charters any vessels engaged in the domestic, intercoastal or coastwise service. It further provides that the Board shall not grant any application which it finds "will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act." Finally, the statute makes it unlawful, if an application is

¹ We shall refer to these two collectively as "the Board."

granted, "to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations."

Petitioner operates a subsidized service between California ports and the Far East, and a non-subsidized service between such ports and Guam (Report, p. 5).² In December 1954 it sought permission from the Board to operate an unsubsidized Pacific Coast-Hawaii service (*id.*, p. 3).

Intervenor Matson Navigation Company ("Matson") opposed the application (*id.*, p. 4). Matson, an unsubsidized carrier, has been in the Pacific Coast-Hawaii trade for 73 years, is closely interlocked with major sugar, pineapple and other important economic interests in the islands, and carries 98% of the cargo in the trade (*id.*, p. 22 (dissenting opinion); Exam. Rec. Dec., pp. 8-10). Although Matson itself is unsubsidized, it operates a subsidized service to Australia through a wholly-owned subsidiary, Oceanic Steamship Co. ("Oceanic") (*id.*, p. 10). Matson and Oceanic have identical officers, directors, management, and, with minor exceptions, freight traffic staffs in the United States, and have common offices, agents, and terminals (*ibid.*).

After a lengthy hearing (the transcript of testimony contains more than 7500 pages and the 176 exhibits contain approximately 1900 pages), the examiner recommended that the application be granted. The Board, however, reversed and, by a two-to-one vote (Vice Chairman Guill dissenting), denied the application. In so holding, the Board applied the principle (enunciated in its prior decisions) that "a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry, and to which they are fundamentally entitled" (*id.*, p. 18). The Board found that, if the application were granted, PFEL "would be in a position to concentrate primarily on high value commodities, and would, in effect, 'skim the cream' in this trade" (*id.*, p. 16); that although PFEL competition might

² The facts relating to the carriers here involved are set forth in the examiner's recommended decision and in the Board's report. We believe them to be substantially undisputed.

divert less than 10% of Matson's tonnage in the trade, "the diversion of Matson's revenues may be substantially greater" (pp. 16-17); that such diversion of cargo "would seriously jeopardize Matson's vessel replacement program and would impede the proper development and continuation of Matson's California/Hawaii service" (p. 18); and that the "record fails to show the need for service in excess of that presently provided by Matson and other existing operators" (p. 17). The Board concluded (p. 19) that "to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the purposes and policy of the Act."

STATUTE INVOLVED

Section 805 (a) of the Merchant Marine Act, 1936, 46 U. S. C. 1223 (a), provides as follows:

It shall be unlawful to award or pay any subsidy to any contractor under authority of sections 1171-1182 of this title, or to charter any vessel to any person under sections 1191-1204 of this title, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy

of this chapter: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whoever shall violate this provision shall be guilty of a misdemeanor.

SUMMARY OF ARGUMENT

I. The Board's holding that granting petitioner's application would result in "unfair competition" to Matson in violation of Section 805 (a) rested on its view that "a subsidized operator should not be permitted to deprive regular domestic carriers of cargo which they need, have the capacity to carry, and to which they are fundamentally entitled." We submit, however, that the proper test for determining whether operations of a subsidized carrier would constitute unfair competition against a domestic unsubsidized operator is whether the subsidized carrier would have a competitive advantage by virtue of the fact that it receives subsidy on other operations, and not whether the effect of its competition would be to divert trade from an unsubsidized operator.

A. The legislative history of the Merchant Marine Act, 1936, shows that one of its major purposes was to correct the abuses that had developed under the Merchant Marine Act of 1928 (45 Stat. 689) whereby extensive subsidies paid to operators in foreign commerce (in the form of mail pay contracts) were diverted into domestic operations. Despite strong support for the view that no subsidy should be paid to any carriers engaged in any operations, Congress refused to include such a provision in the bill. On the contrary, it sanctioned subsidized carriers to compete with domestic operators as long as such competition is not "unfair." In the light of this legislative history, we believe that the competition which Congress condemned as "unfair" in Section 805 (a) was where the subsidized operator would in fact divert subsidy moneys into domestic operations and thereby gain an unfair advantage which an unsubsidized operator entering the trade would not have. In addition, the broad phrase "unfair competition" presumably was also intended to prohibit conduct falling within the traditional concept of unfair methods of competition.

B. There is nothing in the Board's findings which shows that, or gives any reasons to explain how, petitioner would gain any competitive advantage over Matson by virtue of its subsidy, or that it would engage in traditional unfair methods of competition. The Board's rationale is simply that Matson, as a primarily domestic carrier, is "fundamentally entitled" to retain its monopoly as against a subsidized competitor seeking to enter the trade, unless the latter can show either that the domestic carrier is not rendering adequate service, or that it does not "need" the cargo which would be diverted. That is not a standard of unfair competition, but of public convenience and necessity. The Board, however, has been given no licensing authority over subsidized carriers seeking to enter domestic commerce, but only the power to determine whether such entry would result in unfair competition.

The Board's theory, therefore, is that what is "unfair" about petitioner's competition is not that it would divert business from Matson (since the same diversion would be caused by an unsubsidized carrier), but that the carrier doing the diverting

is subsidized. But since any competitor entering a trade will inevitably cause some diversion, the mere fact that the diverting carrier is subsidized cannot make its competition "unfair." A monopolist cannot properly be viewed as "fundamentally entitled" to maintain its monopoly against a competitor whose alleged "unfair competition" is, in the final analysis, nothing more than the fact that it will be competing effectively.

II. In addition to finding that granting petitioner's application would constitute unfair competition to Matson, the Board found that it would be prejudicial to the objects and policy of the Act. The latter finding, if valid, constitutes an alternatively independent basis for denying the application.

However, we do not believe that the Board's report adequately sets forth the reasons for its conclusion that permitting petitioner to operate in the Pacific Coast-Hawaii trade would be prejudicial to the statutory objects and policy. That conclusion rests upon the same underlying findings as the unfair competition ruling, and may be based entirely upon, or significantly reflect, that holding. Accordingly, we suggest that if the court reverses the Board's finding of unfair competition, it should remand the case to the agency to consider and clarify the finding of prejudice to the statutory objects and policy.

ARGUMENT

Introduction

Respondent United States of America is of the opinion that the Board erred in finding that grant of petitioner's application would result in unfair competition to Matson. We believe that that finding rests upon a misconstruction as to what constitutes "unfair competition" under Section 805 (a). Further, we suggest that if the court should set aside the finding, it should remand the case to the Board to reconsider and clarify its finding of prejudice to the objects and policy of the Act—a finding which is an alternative independent statutory ground for denying a Section 805 application.

Since the primary concern of the United States is with these issues, we shall not discuss the numerous other questions which petitioner has raised. In so doing, however, we express no opinion with respect thereto.

I. The Board erred in holding that grant of petitioner's application would result in "unfair competition" to Matson

In holding that granting petitioner's application would result in "unfair competition" to Matson in violation of Section 805 (a), the Board applied its "previously enunciated" principles that "a subsidized operator should not be permitted to deprive regular domestic carriers of cargo which they need, have the capacity to carry, and to which they are fundamentally entitled"; that it should "resolve all doubts against activities of subsidized companies"; and that "operators who provide exclusively intercoastal service are entitled, as against primarily offshore operators * * * to whatever intercoastal cargoes they can carry" (Rep., p. 18). We believe, however, that these principles do not provide the proper touchstone for determining under that Section whether the operations of a subsidized carrier would constitute "unfair competition" against a domestic unsubsidized operator. In our view, such competition is "unfair" only if (1) the subsidized carrier has a competitive advantage by virtue of the fact that its operations in other (i. e., foreign) trades are subsidized, or (2) its competitive methods are "unfair" in the sense that they contravene accepted business standards. Absent either of these conditions, we submit that such competition does not become "unfair" merely because it would divert traffic which the domestic carrier may be adequately serving and which it allegedly "needs."

A. The Act does not define the phrase "unfair competition." However, its legislative history supports our view that Section 805 (a) was designed to prevent subsidized carriers from using their subsidy to gain an unfair advantage in competing with domestic unsubsidized operators. Nothing in that history supports the Board's view that it may rest a finding of "unfair competition" on the fact that permitting the subsidized carrier to enter a domestic trade will divert business from operators already in it.

The Merchant Marine Act of 1928 (45 Stat. 689) (the predecessor statute) had provided for the indirect payment of subsidy to American ocean-going carriers in the form of mail pay contracts "with the objective of building up a modern and ade-

quate American merchant marine" (H. Doc. 118, 74th Cong., 1st sess., p. 35). Substantial subsidies were paid under these contracts, but a number of abuses developed under the program. A major one was the diversion into coastwise and intercoastal trade of subsidies intended for foreign operations.

In January 1935 the Postmaster General, after conducting extensive hearings on steamship operations under foreign ocean-mail contracts, submitted a report to the President (the so-called Farley Report) in which he described how foreign operators had diverted substantial subsidy moneys into domestic commerce. The report stated:

* * * operators under the ocean-mail contracts * * * have also formed corporations to operate intercoastal and coastwise vessels in competition with nonsubsidized American lines, contrary to the spirit of the law, which does not permit the award of mail contracts or subsidies to operators engaged in the coastwise and intercoastal trade. By this means *millions of dollars of mail pay have been diverted from use in foreign trade and used to operate in intercoastal and coastwise trade, resulting in unfair competition with nonsubsidized American lines in the same trade.* In some cases mail contracts have actually been awarded directly to favored intercoastal and coastwise operators without the necessity of them having to organize subsidiaries to so unfairly compete with other nonsubsidized American lines. [*Id.*, p. 11, emphasis added.]

One of the conclusions of the report was:

It has not been the intention of Congress that operators of vessels engaged in the protected intercoastal and coastwise trade should be given aid to stifle out their other American competitors who receive no Government aid. Nevertheless, by one subterfuge or another, a very great many of the ocean-mail contractors, especially some of the larger ones, have resorted to the practice of creating subsidiary corporations for that purpose, to which much Government aid has been poured through the parent company; others are intercoastal almost

exclusively in their business, but have been permitted to receive mail contracts and pay because they happen to touch at some foreign port on their intercoastal routes. [*Id.*, p. 18.]

In March 1935 the President sent a message to Congress recommending the passage of "[l]egislation providing for adequate aid to the American merchant marine * * *" (*id.*, p. 2). The Farley report was transmitted with the message, and the President stated that this report had "shown that some American shipping companies have engaged in practices and abuses which should and must be ended" (*ibid.*).

Following this message, a number of bills providing for revision of our Merchant Marine policy were introduced. After extensive hearings, the House Committee on Merchant Marine and Fisheries reported out a bill (H. R. 8555) which proposed substantial changes in the subsidy system. A minority of the Committee opposed the bill, however, on the ground that it failed to correct many of the evils under the old system. Among their complaints was that the "proposed measure permits continuation of the unsound policy of subsidies to intercoastal operators who go through the subterfuge of merely stopping at a foreign port en route, such as Havana, Cuba; Cristobal or Balboa, Canal Zone; for the incidental transaction of business thus placing subsidized American lines in unfair competition with unsubsidized American lines unless it is proposed to subsidize all intercoastal operators." H. R. Rep. No. 1277, 74th Cong., 1st sess. (1935) p. 35.

Shortly before this report, Senator Black had submitted a Preliminary Report of a Special Senate Committee to Investigate Air Mail and Ocean Mail Contracts. S. Rep. No. 898, 74th Cong., 1st sess. (1935). The report discussed in great detail the abuses which had developed in the payment of ocean mail subsidies. It pointed out that substantial subsidy payments had been made to carriers operating in intercoastal routes in competition with unsubsidized carriers (pp. 14-15) and the Committee recommended (p. 43) that

No subsidy should be paid for the benefit of any operator whose financial or corporate structure, in the opin-

ion of the agency administering the subsidy, permits the diversion of the subsidy into activities other than bona fide American-flag foreign-trade shipping enterprises, except that such subsidy payments may be made upon terms and conditions prescribed by the agency administering the subsidy sufficient to protect the Government against such diversion, * * *.

The Committee further recommended (p. 44) that

No vessel, the construction of which is subsidized, should be permitted to operate other than in foreign trade except with the consent of the agency, and the agency should specifically be denied authority to consent to such operation until there shall have been repaid an amount which bears the same proportion to the construction subsidy theretofore paid as the remaining economic life of the vessel bears to its entire economic life.

Some of the bills contained specific prohibitions against payment of subsidy to any carriers operating in the domestic service. S. 2582, introduced on April 15, 1935, did not contain such a prohibition, and on April 27, 1935, Senator Black proposed an amendment which would have prohibited subsidiary payments to anyone operating in the domestic service. 79 Cong. Rec. 6499. See also H. R. 7854 (May 2, 1935) and H. R. 7981 (May 9, 1935).

The House passed H. R. 8555 in 1935, but Congress adjourned before the Senate took any action thereon. After Congress reconvened in 1936, four bills were introduced in the Senate providing for subsidy payments. S. 3500 would have permitted payment of subsidy for a joint foreign and domestic voyage only if the agency found that such payment would be in the public interest, that it was necessary for development of foreign and domestic commerce of the United States and that it would not result in unfair competition to persons engaged exclusively in coastwise or intercoastal trade. It also provided for proportionate refund of subsidy by carriers engaging in domestic operations. At the hearings on the measure, Senator Guffey, who had introduced another of the bills (S. 4110), stated that the "wisdom" of the "policy" in S. 3500

of "permit[ting] a contractor to engage both in foreign and domestic coastwise and intercoastal service" is "questionable for several reasons. For example, it gives such operators an unfair advantage over a coastwise or intercoastal operator not subsidized and divides efforts that are subsidized to develop foreign commerce." Hearings on S. 3500, 74th Cong., 2d sess., p. 126.

The Senate Committee on Commerce recommended passage of the bill with certain amendments. The Committee stated (S. Rep. No. 1721, 74th Cong., 2d sess. (1936) p. 19) that "In order to terminate the practices and abuses which have arisen under the old law, many restricting and limiting safeguards have been inserted in the proposed bill" including the provision that

7. Ownership of any interest whatever in the coastwise business is prohibited, except that the Authority after public hearing, if it find that the public interest and convenience so require, may grant permission to engage in the coastwise trade, if it does not cause unfair competition to any person operating exclusively in the coastwise or intercoastal service.

As finally passed, however, Congress eliminated the requirement that the Board find that grant of the application be in the public interest and convenience, and in its place substituted the requirement that the proposed domestic service not be prejudicial to the objects and policy of the Act. The provision with respect to unfair competition remained unchanged.

The significant points of this legislative history, we believe, are: (1) that one of the major evils under the 1928 Act, which Congress sought to correct in the 1936 legislation, was that subsidy paid for the purpose of developing our foreign Merchant Marine had been diverted to domestic operations—a diversion which not only thwarted the policy of the subsidy program, but also was deemed to constitute unfair competition against unsubsidized domestic operators; (2) that despite strong support for the view that subsidy should be paid only to carriers operating exclusively in foreign trade, Congress refused to include such a provision; and (3) that Congress permitted a subsidized carrier to engage in domestic commerce

only on a finding by the agency that such participation would not cause unfair competition to any person operating exclusively in coastwise or intercoastal service.

In the light of this legislative history, we believe that the competition which Congress condemned as "unfair" in Section 805 (a) was where the subsidized operator would in fact divert subsidy moneys into domestic operations. That is, competition is "unfair" if, as a result of its subsidy, the foreign operator would have a competitive advantage over the domestic carrier which an unsubsidized operator entering the trade would not have. In addition, the broad phrase "unfair competition" presumably was intended also to prohibit any conduct which comes within the traditional concept of unfair methods of competition.

B. The Board's finding that petitioner's proposed Pacific Coast-Hawaii service would result in "unfair competition" to Matson can be sustained, therefore, only if there are adequate subsidiary findings which show either that petitioner would be using the subsidy obtained on other routes to gain an unfair competitive advantage over Matson in the Pacific Coast-Hawaii trade, i. e., an advantage that a non-subsidized carrier would not have if it entered the trade, or that petitioner utilized unfair competition methods. The Board's report can be searched in vain, however, for any findings which show that its holding of unfair competition rested on either of these bases.

There are no facts set forth which show that, or reasons given to explain how, petitioner would gain any competitive advantage over Matson by virtue of its subsidy.³ Indeed, the examiner specifically ruled to the contrary, for he pointed out (Recommended Decision, p. 10) that "Matson's witness admitted that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy." In view of the close affili-

³ The Board did summarize the grounds upon which "Matson contends that the proposed competition of PFEL would be unfair" (Rep., p. 12). But a statement of a party's contentions is not equivalent to a statement of the agency's decisional basis. *Baltimore & O. R. Co. v. United States*, 201 F. 2d 795 (C. A. 3, 1953).

ation between Matson and the major shipping interests in Hawaii (Rep., p. 10; Examiner's Rec. Dec., pp. 8-10), it would appear that the examiner correctly found (Rec. Dec., p. 10) that "Matson rather than PFEL would have the advantage in obtaining cargo." The Board gave no explanation for its rejection of this finding.

On the basis of the Board's findings, there is no more ground for concluding that petitioner would utilize its subsidy in competing against Matson than in concluding that Matson itself would use in its Hawaii operation the subsidy which its wholly owned and operated subsidiary (Oceanic) receives. Nor is there anything in the findings which even suggests that petitioner would engage in practices which come within the traditional ambit of "unfair methods of competition."

The rationale of the Board's decision, therefore, must be its theory that Matson, as a primarily domestic carrier, is "fundamentally entitled" to retain its business as against a subsidized operator seeking to enter the trade, unless the latter can show either that the domestic carrier is not adequately serving the trade, or that it does not "need" the cargo which would be diverted. But that is not a standard of unfair competition, but of public convenience and necessity. Petitioner would cause the same diversion of traffic from Matson upon entering the trade even if it were unsubsidized.⁴ Under the Board's theory, therefore, what is "unfair" about petitioner's competition is, not that it would divert business from Matson (since the same diversion would be caused by an unsubsidized carrier), but that it is a subsidized carrier that is doing the diverting. But since any competitor entering a trade inevitably will cause some diversion, the mere fact that the diverting carrier is subsidized cannot make its competition "unfair." For otherwise, every proposal by a subsidized carrier to enter domestic operations would result in unfair competition. Section 805 (a), however, provides that some subsidized carriers (i. e., those engaging in fair competition) shall be permitted to compete against domestic unsubsidized operators.

⁴ As the Board pointed out (Rep., p. 19), an unsubsidized carrier may enter the trade without obtaining its permission.

In determining whether competition would be unfair, the Board thus appears to be applying the traditional standard for passing upon licenses to enter a business—public convenience and necessity.⁵ But the Board has no authority to grant or withhold licenses to subsidized operators seeking to enter domestic trade; its power is to determine whether such entry would result in unfair competition. Indeed, Congress rejected the proposal that the Board apply a public convenience and necessity test in passing upon Section 805 (a) applications. For an earlier draft of the legislation would have required the Board to find, in order to grant an application, that the proposed domestic service by the subsidized carrier was required by “public interest and convenience,” see *supra*, p. 10.

There is nothing in the language or the legislative history of Section 805 (a) which supports the Board’s concept of “fundamental entitlement” as a basis for determining whether proposed competition by a subsidized operator would be “unfair” to an existing domestic carrier. Indeed, we believe that it would distort the ordinary meaning of language to make that determination turn upon whether the existing service is adequate and whether the competitor would divert substantial traffic. An existing carrier ordinarily will lose business when a competitor enters the trade. And the extent of such loss may well be greater where, as here, the domestic operator previously had a virtual monopoly of the business. But we do not believe that a monopolist properly can be viewed as “fundamentally entitled” to maintain its monopoly against a competitor whose alleged “unfair competition” is, in the final analysis, nothing more than the fact that it will be competing effectively.

II. If the Court holds that the Board’s finding of unfair competition is erroneous, it should remand the case to the Board to reconsider and clarify its finding of prejudice to the objects and policy of the Act

Under Section 805 (a), the Board’s finding that granting petitioner’s application would also be prejudicial to the objects and policy of the Act constitutes an alternative independent

⁵ Compare the Board’s statement (Rep., p. 17), as one of the grounds for denying the application, that the “record fails to show the need for service in excess of that presently provided * * *.”

basis for denial of the application. That conclusion, however, rests upon the same underlying findings as the unfair competition holding, and may, therefore, be based entirely upon, or significantly reflect, that holding.

We recognize, of course, that the Board has broad discretion to determine whether grant of a Section 805 (a) application would be prejudicial to the objects and policy of the Act. We do not believe, however, that the Board's report adequately sets forth the reasons for its conclusion that permitting petitioner to operate in the Pacific Coast-Hawaii trade would have that effect. The Board has not explained what objects and policy would be prejudiced, or in what respects. For all we know, the rationale may be only that unfair competition (as the Board defines it) necessarily also is prejudicial to the statutory objects and policy. In short, we submit that the Board has not sufficiently set forth the basis of its decision on this aspect of the case to enable this Court properly to perform its reviewing function. See *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 510-511; *Secretary of Agriculture v. United States*, 347 U. S. 645, 652-654.

Accordingly, we suggest that if the Court holds that the Board's finding of unfair competition is erroneous, it should remand the case to the agency to reconsider and clarify the finding of prejudice to the objects and policy of the Act. Cf. *Schaffer Transportation Co. v. United States*, 355 U. S. 83. We note in passing, however, that there is nothing in either the declaration of policy in the Merchant Marine Act, 1936, or in any of its provisions, or in its legislative history, which suggests that its objects and policy include the preservation of monopoly. The Board's report contains no indication that the agency, in determining the question of prejudice to the Act, gave any consideration to the fact that grant of petitioner's application would help to break Matson's stranglehold on this trade. Indeed, the Board does not even refer to the fact that Matson has 99% of the business; that fact appears only in the dissenting opinion.

CONCLUSION

The Board erred in holding that grant of petitioner's application would result in "unfair competition" to Matson. If the Court so holds, it should reverse and remand to the Board to reconsider and clarify its holding that grant of the application also would be prejudicial to the objects and policy of the Merchant Marine Act, 1936.

Respectfully submitted.

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FEBRUARY 1958.

ADDENDUM AS TO JURISDICTION

We adhere to the position previously taken in our concurrence in the Board's motion to dismiss for lack of jurisdiction, namely, that any review of Board orders entered under authority of the Merchant Marine Act, 1936, may be had only in the district court, and not in the court of appeals. Petitioner has filed suit in the district court seeking review of the same order. However, there the Board (appearing through the Department of Justice) has filed an answer contending, inter alia, that its order is not subject to any judicial review. In our view the district court is the proper forum to determine in the first instance whether the Board's order is judicially reviewable and, if so, whether it is valid.

**ANSWER OF UNITED STATES AND FEDERAL MARI-
TIME BOARD TO PETITION FOR REHEARING**

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,007

PACIFIC FAR EAST LINE, INC., PETITIONER,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD,
MARITIME ADMINISTRATION, AND CLARENCE G. MORSE,
MARITIME ADMINISTRATOR, RESPONDENTS,

MATSON NAVIGATION COMPANY, INTERVENER.

PETITION FOR REVIEW OF ORDER OF THE FEDERAL MARI-
TIME BOARD AND MARITIME ADMINISTRATION

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 26 1958

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*PETITION FOR REVIEW OF ORDER OF THE FEDERAL MARI-
TIME BOARD AND MARITIME ADMINISTRATION*

**ANSWER OF UNITED STATES AND FEDERAL MARITIME
BOARD TO PETITION FOR REHEARING**

Petitioner seeks rehearing, or in the alternative rehearing *en banc*, of the decision of this Court that it has no jurisdiction, under the Judicial Review Act of 1950 (5 U.S.C. 1031 *et seq.*), to review orders of the Federal Maritime Board entered pursuant to Section 805(a) of the Merchant Marine Act, 1936 (46 U.S.C. 1223). The Review Act gives courts of appeals jurisdiction to review only "such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping

Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section [31, Shipping Act, 1916, as amended]”.

Most of petitioner's contentions are repetitions of its arguments previously made and rejected by this Court, and have already been fully answered by the Board. However, one contention calls for a brief reply.

Petitioner argues (Pet., pp. 5-8) that since the Maritime Administration (as distinguished from the Board) issues no orders under either the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, but does issue orders under the Merchant Marine Act, 1936, the reference in the Review Act to final orders of the “Maritime Administration” shows that Congress intended that orders entered under authority of the Merchant Marine Act, 1936, were to be treated as entered under the 1916 or 1933 Acts. A more logical explanation of the reference to the Administration, however, relates to the fact that the Judicial Review Act of 1950 was drafted at approximately the same time that Reorganization Plan No. 21 went into effect. That plan divided the functions of the former Maritime Commission between the Federal Maritime Board and the Maritime Administration. Congress apparently referred to the Maritime Administration in the 1950 Review Act either because it had not carefully examined the respective division of functions under the Reorganization Plan or, more likely, to guard against the possibility that, in some subsequent reorganization, some of the functions under the 1916 and 1933 Acts which Reorganization Plan No. 21 gave to the Board might be transferred to the Administration. There is accordingly no basis for petitioner's contention—a contention which has no support in the legislative history—that the mere inclusion of the Maritime Administration in the Judicial Review Act of 1950 justifies overturning the plain language of the statute limiting the court of appeals' jurisdiction to review Board orders to those entered under the 1916 and 1933 Acts.

Petitioner suggests (Pet., p. 6) that the Court's holding

would make unreviewable, under the Review Act of 1950, all orders entered by the Maritime Administration. But that conjectural question is not now before the Court; it is time enough to reach that issue if and when such orders are presented for review.

It is, therefore, respectfully submitted that the petition should be denied.

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**BRIEF FOR INTERVENOR, MATSON NAVIGATION
COMPANY**

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,007

PACIFIC FAR EAST LINE, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, AND CLARENCE G. MORSE, MARITIME ADMINISTRATOR, *Respondents*

MATSON NAVIGATION COMPANY, *Intervenor*

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Questions Presented

1. Whether this Court has jurisdiction under the Act of December 29, 1950, to entertain a petition for review of action by the Federal Maritime Board and Maritime Administrator denying an application of a subsidized shipping operator under Section 805 (a) of the Merchant Marine Act, 1936, in view of

- (a) the failure of the 1950 Act to refer to orders entered under the 1936 Act as included within the orders so made reviewable,
- (b) the fact that at the time petitioner filed the petition for review its timely petition for reconsideration was pending before the Board and Administrator, and the failure of petitioner to seek review within the sixty day period provided by the 1950 Act of the action of the Board and Administrator denying such petition for reconsideration, or
- (c) the nature of the action sought to be reviewed, which refused to relieve petitioner from a restriction voluntarily accepted by it as a statutory condition of its receipt of operating subsidy.

2. Whether the determination of the Federal Maritime Board and Maritime Administrator that:

- (a) award of Section 805 (a) permission in the instant case would result in unfair competition to a person, firm, or corporation operating exclusively in the coastwise or intercoastal service; or

(i)

(b) award of Section 805 (a) permission in the instant case would be prejudicial to the objects and policy of the Merchant Marine Act, 1936,

has warrant in the record and a reasonable basis in law.

3. Whether the Report of the Federal Maritime Board and Maritime Administrator adequately states their findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact and law presented on the record.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,007

PACIFIC FAR EAST LINE, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, AND CLARENCE G. MORSE, MARITIME ADMINISTRATOR, *Respondents*

MATSON NAVIGATION COMPANY, *Intervenor*

**BRIEF FOR INTERVENOR, MATSON NAVIGATION
COMPANY**

Jurisdiction

If this Court has jurisdiction to entertain the instant petition for review filed by Pacific Far East Line, Inc. (herein called PFEL), it is solely by virtue of section 2 of the Act of December 29, 1950, c. 1189, 64 Stat. 1129, as amended, 5 U.S.C. 1032. Motions to dismiss the petition for want of jurisdiction were duly filed by Respondents Federal Maritime Board, Maritime Administration, and

Clarence G. Morse, Maritime Administrator (herein collectively called the Board), concurred in by Respondent United States of America, and by Intervenor Matson Navigation Company (herein called Matson). On October 11, 1957, it was:

“ORDERED by the Court that the aforesaid motions to dismiss be, and they are hereby, denied without prejudice to their renewal at the hearing of this case on the merits.”

As developed under Point I, below, Matson does hereby renew its objections to the jurisdiction of this Court, on the grounds asserted in support of the prior motions to dismiss as well as upon other grounds.

Statement of the Case

Matson has conducted exclusive continental United States-Hawaiian transportation services, without operating subsidy or other Government aid, in good times and bad for some seventy-five years (Ex. 3, Item 1, p. 1; Tr. 2478). With a substantial, although minority, portion of its stock held by Hawaiian interests (Tr. 3185-89), Matson has dedicated itself to the service of the Island economy (Tr. 6917-18). When opportunities for more profitable use of freight vessels have beckoned in other parts of the world, as recently for example during the Korean hostilities, Matson alone has continued, without diminution, this service (Ex. 3, Item 1, p. 2; Tr. 2478, 6917-18). Such ocean transportation is essential to the prosperity and even the survival of the Hawaiian economy (Tr. 1890-92, 2170, 6683-84, 6908-09, 6917-18). If not performed by a privately-owned operator, it must be provided by the Government. Although operating at what the Board called only “modest

profit" (Report,¹ p. 16; Ex. 3, Item 16; Tr. 3336), Matson continues to conduct one of the few surviving ocean-borne domestic services.

As the operator of domestic services between the West Coast, Gulf and Atlantic Coasts of continental United States and Hawaii (Ex. 3, Item 7; Tr. 2299, 6944-46), Matson is not entitled to operating-subsidy or other forms of Government aid (Section 601(a), Merchant Marine Act, 1936, c. 858, 49 Stat. 1985, 46 U.S.C. 1171). Also, Matson has no franchise, exclusive or otherwise, for the operation of this service. No franchise or other permission is needed by any non-subsidized American-flag operator to enter the Hawaiian domestic service (Report, p. 19). Although Matson is the predominant carrier (Ex. 1, Schedule B; Tr. 3336-37), several other American-flag operators serve Hawaii in domestic commerce, notably Isthmian Lines, Inc. (Tr. 2246), Waterman Steamship Corporation (Tr. 2244), States Steamship Company (formerly Pacific Transport Lines and States Steamship Company) (Ex. 1, Schedule B), American Pioneer Line (United States Lines Company) (Tr. 2245) and American President Lines, Ltd. (Ex. 1, Schedule B). PFEL, which commenced operations to the Far East in 1946, was perfectly free to enter the Hawaiian domestic service until 1953, when it applied for and obtained from the Board operating-subsidy with respect to its Far East service in foreign commerce (Ex. 25, pp. 7-8; Tr. 2614).

By so electing to obtain the benefits of operating-subsidy, PFEL likewise elected to bring itself within the limitations imposed by Section 805 (a) of the Merchant Marine Act,

¹ Report of the Board and Administrator, entered May 10, 1957, in Docket No. S-52, Application of American President Lines, Ltd., and Docket No. S-55, Application of Pacific Far East Line, Inc. (herein sometimes called Report). The Report has not been printed by the Board. Page references cited herein will refer to the multilith copy of the Report served by the Board.

1936. This section, the full text of which is quoted in the appendix to this brief, prohibits, among other things, a subsidized operator from engaging in domestic trade without the written permission of the Board. With an exception not here relevant, the Board is forbidden to grant an application for such domestic service if it finds that such service "will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal [including Mainland-Hawaii] service or that it would be prejudicial to the objects and policies of this Act . . ." PFEL accepted similar limitations set forth in Article II-15 of the contract, which it executed, providing for operating-subsidy (Ex. 60; Tr. 2608).

In December, 1954, PFEL applied to the Board, as required by the limitations imposed by Section 805 (a) and its subsidy contract, for permission to serve Hawaii in domestic commerce (Ex. 18; Tr. 1363). The Board set the matter down for hearing before one of its examiners. Hearing was held in San Francisco, Honolulu and Washington, D. C., and consumed some nine and one-half weeks. The result was 7,561 pages of transcript and 177 exhibits. The evidence so adduced consisted of a vast body of factual information, practically all of which was uncontradicted. Differences existed and still exist as to the significance and even relevance of much of this material, but there are few, if any, instances of disputed testimony or other contradicted evidence pertinent to the basic issues.

The Examiner in his recommended decision² concluded that PFEL should be granted the permission which it sought (Rec. Dec., p. 18). In Matson's view, as fully developed by its exceptions, reply to opposing exceptions and argument before the Board, the Examiner failed to

² Recommended Decision of F. J. Horan, Examiner, served Dec. 19, 1956, in FMB Dockets S-52 and S-55, herein sometimes called Rec. Dec.

follow the Board's own precedents, misinterpreted certain of the evidence, and failed to apply the appropriate yardstick to it.

Oral argument was had before the Board, which on May 10, 1957, entered its decision. After a review of all pertinent contentions, the Board concluded that the PFEL application should be denied (Report, pp. 19-20). Following its own prior decisions (Report, pp. 15, 18), and the Congressional solicitude expressed in Section 805(a) and elsewhere for the protection of the domestic operator against subsidized competition, the Board concluded that Matson was "fundamentally entitled" as against PFEL to the cargo available in this domestic service, that it had the capacity to carry such cargo and provided an adequate service, and that it needed this cargo in order to maintain its service and eventually to replace its freighter fleet (Report, pp. 17-18). In accepting Matson's contention that it was fundamentally entitled to the cargo, the Board quoted with approval the following passage from Matson's brief:

"We use the expression 'fundamentally entitled', of course, in the context of this proceeding. The question of who is fundamentally entitled to cargo naturally does not arise where there is free competition with none of the contestants supported by the Government. On the other hand, the question of fundamental entitlement arises sharply where, as here, there is a domestic operator which is entitled to the protection of section 805(a) from a subsidized operator." (Report, pp. 12, 19.)

The Board's decision is entitled "Report of the Board and Administrator". The only "order" that issued in this regard is contained in its concluding sentence, "We therefore deny such application." (Report, p. 20.)

Following the Board decision, of May 10, 1957, PFEL, on June 13, 1957, filed with the Board a lengthy petition for reconsideration, reargument and further hearing and for other relief. Such a petition is expressly permitted by Rule 16 of the Board's Rules of Practice and Procedure within thirty days after the date of service of the Board's decision.³ While such petition was pending before the Board, PFEL, on July 9, 1957, filed the instant petition for review in this Court, limited to a review of the Board's "final order" of May 10, 1957. The Board on July 29, 1957, denied PFEL's petition for reconsideration. No further petition was filed by PFEL in this Court, nor did PFEL amend the petition filed July 9, 1957.

It will be convenient, and we believe helpful to the Court, to consider the more detailed findings of the Board and the supporting evidence at the appropriate points under the Argument.

Statutes Involved

Section 2 of the Act of December 29, 1950, and Section 805(a) of the Merchant Marine Act, 1936, are set forth in the appendix to this brief.

Summary of Argument

I. Serious questions are presented as to the jurisdiction of the Court on three separate and independent grounds.

A. If this Court has jurisdiction, this is so by virtue of the reviewing statute of December 29, 1950, which, however, extends only to final orders of the Board "entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended." The present order was entered under neither of these acts but under

³ The Board's decision was "served" May 14, 1957.

the authority of Section 805 (a) of the Merchant Marine Act, 1936.

B. The Act of December 29, 1950, requires that the review petition be filed "within 60 days after entry" of such "final order". The instant petition for review was filed within 60 days after May 10, 1957, when the Board entered its decision, but in the meantime PFEL had filed a petition for reconsideration with the Board within the 30-day period expressly provided by its Rules. The petition for review was hence premature. No further or supplemental petition to this Court was filed by PFEL within 60 days after entry by the Board on July 29, 1957, of its order denying reconsideration. Decisions of this Court, subsequent to the enactment of the Administrative Procedure Act, indicate that in these circumstances the jurisdiction of the Court has not been properly invoked.

C. The limitations of Section 805 (a) of the Merchant Marine Act, 1936, are designed, by remedying prior abuses, to protect unsubsidized domestic operators against competition from operators who receive subsidy in foreign commerce. That section prohibits such a subsidized operator from conducting a domestic operation without the written permission of the Board. The section is thus not of general application, but imposes its restrictions only upon the operator which, by deliberately electing to receive subsidy in foreign commerce, brings itself within the section. There is obviously no constitutional or common law right to subsidy; Congress has provided the subsidized operator with an exclusive remedy as to Section 805 (a), a hearing before the Board; no provision is made for resort to the courts. Hence, the present situation presents a classic case for the preclusion of judicial review.

II. If the jurisdiction of the Court has been properly invoked, the scope of review is narrowly limited. PFEL's

contentions that the Board failed to give due consideration to the Examiner's recommended decision, as well as its contention that the Board was obliged to give reasons with respect to "any" of the Examiner's findings or recommendations with which it disagreed, are erroneous both in fact and in law.

III. Reviewing the critical determinations of fact and law, as set forth in the Board's report, it is apparent that its findings have warrant in the record, its conclusions a reasonable basis in law, and that both are adequate to support its denial of the PFEL application. Following its own precedents, the Board applied Section 805 (a) strictly in accordance with the Congressional mandate. Invoking the tests employed in prior cases, the Board found and concluded that Matson had the necessary capacity and provided an adequate service, that it needed the available cargo in order, from a revenue standpoint, to maintain and develop the service, and that as against PFEL it was "fundamentally entitled" to the available cargo. In this connection, the Board carefully pointed out that any unsubsidized United States operator is free to enter the Hawaiian service at any time without permission; that this case presented a contest between free and *subsidized* competition; and that in using the expression "fundamentally entitled", it meant that Matson was so entitled to the cargo as against a subsidized operator, like PFEL. The Board carefully considered all relevant contentions advanced by PFEL, and its decision provides a reasoned basis for its denial of the application.

IV. We conclude with the consideration of three miscellaneous complaints advanced by PFEL, to the effect that the Board (1) discriminated against PFEL, (2) considered irrelevant PFEL's claim that Matson's present Ha-

waiian service is unlawful, and (3) failed to give proper weight to the policies of the antitrust laws. In the context of this proceeding, these are patently make-weight contentions. The Board did not discriminate against PFEL, but simply refused to discriminate in favor of PFEL. The record affirmatively shows that Matson's present service is lawful; this was not the type of proceeding, however, in which the matter could be litigated, and the Board therefore properly found the contention to be outside the issues. And as to the antitrust laws, the Board's decision shows that it gave the factor of competition careful consideration.

Accordingly, the petition should be dismissed for want of jurisdiction or, alternatively, the Board's decision should be affirmed on the merits.

ARGUMENT

I. This Court Lacks Jurisdiction to Entertain the Instant Petition Because (A) No Statute Grants Jurisdiction, (B) The Petition Does Not Seek Review of a "Final Order" of the Board, and (C) The Board's Action by Its Nature Is Not Subject to Judicial Review.

Although various terminology might be employed, all of the issues dealt with under this point go to the question of whether the Court may entertain the instant petition and therefore, in one sense or another, to the jurisdiction of the Court.

A. No Statute Confers Jurisdiction upon the Court to Entertain this Proceeding

In contending that this Court has jurisdiction of the case, PFEL must rely solely upon Section 2 of the Act of December 29, 1950. This section, so far as now pertinent, gives the courts of appeals jurisdiction to review orders of the Board "entered under authority of the Shipping Act,

1916, as amended, and the Intercoastal Shipping Act, 1933, as amended. . . .” On its face, the action of the Board sought to be reviewed was taken under neither of these acts, as amended or otherwise, but under Section 805 (a) of the Merchant Marine Act, 1936. This Court, therefore, would appear to have no jurisdiction of the case.

In PFEL’s answer to the motions to dismiss, it argued in effect that the Merchant Marine Act, 1936, is simply a part of the Shipping Act, 1916, as amended. This contention seems contrived and far-fetched for the reasons fully developed in Maritime Counsel’s brief, under Point I. We join in the argument there presented.

We object to the jurisdiction of the Court on this ground with diffidence because, if review is to be had, there are manifest advantages in proceeding in a court of appeals rather than in a district court. There would seem to be no alternative, however, but to present to the Court the substantial considerations which argue against the presence of jurisdiction under the 1950 reviewing statute.

B. The Petition Does Not Seek Review of a “Final Order” of the Board

The Act of December 29, 1950, gives this Court jurisdiction to review only “final orders” of the Board entered under authority of the specified statutes (Section 2, 5 U.S.C. 1032), upon petition filed “within sixty days after entry of such order” (Section 4, 5 U.S.C. 1034). We have seen, *supra*, p. 6, that the Board entered its order on May 10, 1957, and that the petition for review was filed July 9, 1957, within sixty days of such decision. In the meantime, however, PFEL, on June 13, 1957, had reinvoked the jurisdiction of the Board by filing a petition for reconsideration, further hearing, etc., within the thirty-day period after service expressly provided by the Board’s Rules. Matson

filed a comprehensive reply to PFEL's lengthy petition. On July 29, 1957, the Board acted to deny rehearing and reopening. The PFEL petition filed in this Court on July 9, 1957 sought, of necessity, review only of the decision of May 10, 1957. No petition to review what in fact was the final action of the Board, of July 29, 1957, was filed within sixty days thereafter.

This Court, citing authority, has stated that "Unquestionably, the general rule is that the time for taking an appeal is suspended by a seasonably filed motion for new trial or petition for rehearing." *Safeway Stores, Inc. v. Coe*, 78 U.S. App. D.C. 19, 22, 136 F. 2d 771, 774. Additional federal cases so holding are collected at 10 A.L.R. 2d 1075, 1079. The concluding sentence of Section 10 (c) of the Administrative Procedure Act, enacted in 1946, c. 324, 60 Stat. 237, 5 U.S.C. 1009 (c), reads:

"Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

PFEL is apparently forced to contend that the quoted language obliterated the salutary rule declared in the above cases and permits, and even requires, a petitioner desiring both agency reconsideration and, if thereafter necessary, court review to invoke the jurisdiction of both at the same time, and, further, permits a petition to the court seeking a review of an earlier agency decision to serve the office of a petition seeking review of what in fact is the final decision. We submit that no such undesirable result is

worked by Section 10 (c), and that the decisions of this Court have refused to give this section any such effect.

State Airlines, Inc. v. Civil Aeronautics Board, Civil No. 9604, decided by this Court September 3, 1947, unreported, was a case where a litigant sought a review by a petition filed more than 60 days after the original action of the Civil Aeronautics Board but while its petition for reconsideration was pending before that agency. A motion to dismiss was filed on the alternative grounds that the petition was either too late, having been filed subsequent to the sixty days for review, or premature, having been filed prior to the determination of the petition for rehearing. The effect of Section 10 (c) of the Administrative Procedure Act was fully briefed by the parties. This Court dismissed the petition "on the ground that the petition for review is premature".

The holding of this case seems unmistakable as applied to the instant situation. PFEL's petition of July 9, 1957, was premature; no timely petition having been filed to review the "final order" of the Board of July 29, 1957, the Court lacks jurisdiction and the case should be dismissed.

Subsequent decisions of this Court point to the same conclusion. *Albertson v. Federal Communications Commission*, 87 U.S. App. D.C. 39, 42, 182 F. 2d 397, 400: "the twenty day period for noting the appeal commenced from the effective date of the order denying the motion to reconsider"; *Enterprise Company v. Federal Communications Comm'n.*, 97 U.S. App. D.C. 374, 378, 231 F. 2d 708, 712, certiorari denied, 351 U.S. 920: "jurisdiction over an order remains with the Commission until the time for appeal has expired, and that time is tolled by an application for rehearing".

To the same effect is *Telecasting, Inc. v. Federal Communications Comm'n.*, Civil No. 12841, decided by this Court September 16, 1955, unreported. Cf. *Wrather-*

Alvarez Broadcast. v. Federal Commun. Com'n., — U.S. App. D.C. —, 248 F. 2d 646. That case involved a peculiar situation where a party other than appellant had filed a petition for rehearing subsequent to the filing of the appeal. The Court entertained the appeal and distinguished the *Telecasting* case, but raised no question as to the soundness of that or the prior decisions heretofore cited. In fact, the Court referred to its "refusal to retain a case when the appellant himself subsequently petitions the Commission for rehearing", citing the *Telecasting* case. 248 F. 2d at p. 649.

The only contrary decisions which have come to our attention are in the Ninth Circuit. *Consolidated Flowers Ship. v. Civil Aeronautics Bd.*, 205 F. 2d 449; *Northwest Marine Term. Ass'n. v. Federal Maritime Bd.*, 218 F. 2d 815.

The language of Section 10 (c)—"whether or not there has been presented or determined any application . . . for any form of reconsideration"—may be regarded as sufficiently ambiguous to raise the question whether it should not be read to mean "notwithstanding that no petition for any form of reconsideration has been presented or determined." The legislative history of the section shows that the purpose of the language in question was simply to assure that, except where expressly required by statute, an order should be deemed final for purposes of court review even though no petition for rehearing had been presented or decided. The moving purpose was to eliminate an increasing number of meaningless petitions for reconsideration. Interestingly enough, drafts of the Administrative Procedure Act prior to the final draft contained the language, "notwithstanding that no petition . . . has been presented". The legislative history contains no explanation for the change. It has been suggested that the change in text may simply have resulted from a natural

inclination on the part of some draftsman to substitute the more usual "whether or not" for the rather unusual "notwithstanding that no".⁴

In our view, the problem of statutory interpretation here considered presents the converse of that considered under A, above. Under A the text of the statute is unambiguous and ambiguity, if any, can be compounded only by an argument based on a part of the legislative history. Mr. Justice Frankfurter has referred to "the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366, 374. It may be suggested that, as to A, PFEL counsel would do well to apply the wisdom of Justice Frankfurter's wag.

Here, on the other hand, the wording of the statute suggests an ambiguity which is resolved by a resort to the legislative history. The decisions of this Court point to the proper result. The petition filed with this Court is premature, and no timely petition was filed to review the "final order" of the Board.

C. The Board's Action By Its Nature Is Not Subject to Judicial Review

The case was decided under Section 805 (a) of the Merchant Marine Act, 1936, which, as we have seen, prohibits a subsidized operator from engaging in domestic trade without the written permission of the Board. More particularly, that section provides that it shall be "unlawful to award or pay any subsidy to any contractor" who engages in such commerce without such written permission.

⁴ The legislative history here summarized is ably and compactly set forth in a note at 6 Stanford L. Rev. 531, which contains full references. That note criticizes the decision of the Ninth Circuit in the *Consolidated Flowers* case, above cited, and discusses with approval the decisions of this Court in the *State Airlines* and *Albertson* cases.

This section appears in the 1936 Act under Title VIII, which bears the heading "Contract Provisions", and its substance is repeated in the operating-differential subsidy contract which PFEL executed with the United States, acting by the Board. (Ex. 60, Article II-15; Tr. 2608.) Section 805 (a), which has remained unamended since its enactment in 1936, expresses the Congressional concern for the protection of domestic commerce against subsidized competition.

It will be seen at once that Section 805 (a) imposes no restraints of general application upon ship operators, but is limited to those who elect to apply for and obtain an operating-differential subsidy. The restraints of this provision are applicable to PFEL solely by its own election.

Section 805 (a), it will be further noted, expressly provides one situation in which the Board "shall grant" such permission for domestic operations. This is where the subsidized operator was in bona-fide operation in the domestic service in 1935, under the limitations there set forth, and is thus vested with "grandfather rights". This provision is not applicable to PFEL, which for the first time proposes to operate a domestic Hawaiian service (Ex. 18; Tr. 1363). As to all other situations, Section 805 (a) expresses the conditions not under which the Board shall grant permission, but the conditions under which the Board "shall not" grant permission. The section provides that any person having an interest in the application "shall be permitted to intervene" and that the Board "shall give a hearing" to the applicant and the intervenors. The Board "shall not" grant any such application if the Board "finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or inter-coastal [including Mainland-Hawaii] service or that it would be prejudicial to the objects and policies of this Act". Section 101 of the Act, 46 U.S.C. 1101, expressly

includes within such objects and policies the maintenance of a merchant marine "sufficient to carry" the "domestic water-borne commerce" of the United States.

The 1936 Act makes no provision for judicial review of a Board decision denying the application under Section 805 (a) of the subsidized contractor. This omission has particular significance because the Act does expressly provide for judicial review in various other circumstances. See Sections 402, 611 and 902, 46 U.S.C. 1142, 1181 and 1242. In opposing the motions to dismiss, PFEL referred to Section 31 of the Shipping Act, 1916, c. 45, 39 Stat. 728, 46 U.S.C. 830, which provides that "suits brought to enforce, suspend, or set aside, in whole or in part, *any order*" of the Board "shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission", etc. (Emphasis supplied.) Were this section to be considered relevant, it may be noted that Section 805 (a) contains no provision for the entry of any "order" by the Board, and that the only "order" entered by the Board in the present proceedings was that denying the petition for reconsideration (from which PFEL filed no petition to review).

The action of the Board, therefore, in refusing the application of a subsidized contractor, who has deliberately elected to submit to the limitations of this provision, would seem to present a classic example of the exceptions to judicial review set forth in Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009. That section excepts from judicial review cases where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." It can hardly be doubted that, except in the case of "grandfather rights", the Board is invested with discretion as to whether to grant under Section 805(a) the application of a subsidized contractor.

And whether a statute is designed to "preclude judicial review" depends not upon an express preclusion but upon the statutory scheme considered as a whole.

Similarly, and for like reasons, referring to Section 10 (a) of the Administrative Procedure Act, 5 U.S.C. 1009 (a), it is difficult to discern in what manner PFEL has suffered any "legal wrong" or has been "adversely affected or aggrieved . . . within the meaning of any relevant statute." Certainly, PFEL has no constitutional or common law right to the payment of operating-differential subsidy on account of its operations in foreign commerce. Congress has offered such subsidy upon conditions, one of which is that the subsidized operator may not engage in domestic commerce without the written permission of the subsidy-paying party to the contract, represented by the Board. PFEL has been accorded the hearing which Congress provided and its application has been denied. Having elected to obtain the benefits which Congress has granted, subject to conditions, the beneficiary must likewise accept the conditions.

The numerous cases precluding judicial review in situations involving Government payments, subsidies or bounties and benefits, subject to conditions, provide impressive support for this conclusion. Illustrative cases so holding are *Perkins v. Lukens Steel Co.*, 310 U.S. 113; *Butte, A. & P. Ry. v. United States*, 290 U.S. 127; *Gt. Northern Ry. v. United States*, 277 U.S. 172; *Work v. Rives*, 267 U.S. 175; *United States v. Babcock*, 250 U.S. 328. In the *Babcock* case, last cited, the Court applied a rule which would seem to be decisive of the present case, namely, that "where a statute creates a right and provides a special remedy, that remedy is exclusive" (250 U.S. at p. 331). And see *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103.

No court has held reviewable the denial of the application of a subsidized operator under Section 805(a). Perhaps

the case closest in point is *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346 (D.C.), which involved Section 605(c) of the Merchant Marine Act, 1936, 46 U.S.C. 1175. There, American President Lines, Ltd. sought to obtain judicial review of the action of the Board in granting operating-differential subsidies to two other operators, one of which was PFEL. The court was obviously troubled by the question of jurisdiction:

“... the action of the Board in granting or withholding a subsidy is similar to the action of other Federal agencies in making or withholding loans and grants. It is not mandatory for the Board to grant a subsidy merely because the applicant complies with specified conditions. It must consider and weigh many aspects of public policy and expediency in reaching a conclusion. A steamship line that petitioned for a subsidy would hardly have any right to secure judicial review of a denial of its application in the exercise of the discretion of the Board. The conclusion necessarily follows that since the action of the Board in passing on an application for a subsidy depends on its discretion, the decision of the Board will not be reviewed by the judicial branch of the Government.” 112 F. Supp. at p. 348.

Referring to Section 10(a) of the Administrative Procedure Act, the court rejected the contention that American President Lines, the plaintiff, had suffered any “legal wrong”, but concluded that it was “adversely affected or aggrieved” by the grant of subsidy to its competitors within the meaning of Section 10(a). The court then subjected the action of the Board to a narrowly-limited review and sustained it.

However, the reasoning of the *American President Lines* case on the jurisdictional point was squarely rejected by this Court in *Kansas City Power & Light Company v. McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, certiorari denied, 350 U.S. 884. This Court there pointed out that Section 10(a) was intended to be a restatement of existing law. Denying the review sought by petitioner, the Court continued:

“Section 10(a) is for the benefit of ‘any person suffering legal wrong’, that is, one whose legal rights have been violated. As we have seen, these plaintiffs cannot effectively make such a claim. Nor are we confronted with any relevant statute within the meaning of which the plaintiffs are ‘adversely affected or aggrieved.’ Plaintiffs-appellants cite and rely on the view expressed in *American President Lines v. Federal Maritime Board*, D.C. D.C. 1953, 112 F. Supp. 346, at page 349, which would in effect delete from Section 10(a) the phrase ‘within the meaning of any relevant statute’. That view cannot, of course, be accepted.” 96 U.S. App. D.C. at p. 281, 225 F. 2d at p. 932.

The foregoing discussion would perhaps not be complete without reference to the line of cases, precluding judicial review, represented by *Switchmen's Union v. Board*, 320 U.S. 297. We do not think it necessary, however, to rely upon such cases as that of *Switchmen's Union*. There, wholly unlike the present case, no Government gratuity was involved and it could be argued that the right with which the case was concerned was not merely the creation of Congress but had common law antecedents. The case now before the Court presents no such difficulties. PFEL has elected to subject itself to certain restraints; it has been

accorded the hearing provided by Congress; that remedy is exclusive.⁵

For the separate and independent reasons discussed under A, B and C, above, the petition to review should be dismissed.

II. If the Jurisdiction of This Court Has Been Properly Invoked, the Scope of Review Is Narrowly Limited.

In the remaining portions of this brief we assume, solely for the sake of discussion and without repeating this reservation, that the jurisdiction of the Court has been properly invoked.

Although we do not believe this to be the kind of case which will turn on any fine-spun distinctions as to the breadth of the Court's reviewing power, the question properly arises at the outset as to the scope of review. Many cases might be cited in this connection, but it seems sufficient to note that the Court's reviewing authority does not extend beyond the determination that the action of the agency has "warrant in the record" and "a reasonable basis in law". As to the latter, otherwise stated, the question is simply whether the agency's conclusion "lacks any rational and statutory foundation". The Court will not substitute its judgment for that of the Board; whether the Court would have reached the same result on the same

⁵ Holding that the *denial* of a subsidized operator's application under Section 805(a), as in the present case, is not subject to judicial review would not seem to imply necessarily that the *granting* of such an application is not subject to judicial review. In the latter situation the injured party is the domestic operator and he has not contracted to accept the exclusive remedy before the Board provided by that section.

The Act of May 11, 1954, c. 199, 68 Stat. 81, 41 U.S.C. 321-322, barring provisions in certain Government contracts designed to preclude or limit judicial review, has no application to the present case. If, as we believe, judicial review is precluded here, it is not due to the subsidy contract but the statute itself. The contract is of significance only as it manifests PFEL's election to accept the limitations of Section 805(a).

record "is not the test". *American Airlines v. Civil Aeronautics Board*, 97 U.S. App. D.C. 324, 327, 231 F. 2d 483, 486; *National Air Freight Forward. Corp. v. Civil Aero. Bd.*, 90 U.S. App. D.C. 330, 333-334, 197 F. 2d 384, 387-388.

PFEL's brief, as its first point of argument, contends that the Board unlawfully refused to give the Examiner's recommended decision the "special cognizance" which it deserved, and that the Board failed to discharge its "obligation to give reasons for rejecting any of the Examiner's findings with which it disagreed" (Br., pp. 9-18). We deny that the Board failed to give due regard to the Examiner's findings or to give all necessary reasons for rejecting those which it refused to follow. The Board carefully reviewed all pertinent issues, and its decision fully develops the reasoned bases for its conclusion. This will be apparent, we submit, from a review of the Board's findings of fact, conclusions of law, and supporting evidence set forth under Point III, below.

The Examiner in our opinion, which was evidently shared by the Board, both misinterpreted the evidence and committed serious errors of law in refusing to follow the Board's own precedents. The Board's decision makes apparent its disagreement with him on these points.

PFEL's specific complaints as to the Board's failure to refer explicitly to statements contained in the Examiner's report (Br., pp. 13-18) will be found, on analysis, to lack substance. The Board properly believed that the statements that PFEL refers to were either lacking in relevance and significance or were not justified when reasoned judgment was brought to bear upon the record as a whole. Certainly PFEL cannot complain because the Board, adopting the technique sometimes used by this and other courts, stated that "Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions

have been found not related to material issues or not supported by evidence." (Report, p.4.)

However, at this point we should challenge PFEL's extravagant contentions to the effect that the Board was bound to give special weight to the Examiner's recommended decision and to give reasons for rejecting "any" of the Examiner's findings or conclusions with which it disagreed (Br., p. 11). Such a contention is not supported by the decided cases and, indeed, would seem at war with the express provision of the Administrative Procedure Act that:

"On appeal from or review of the initial decisions" of examiners "the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision." Administrative Procedure Act., Section 8(a), 5 U.S.C. 1007(a).

The Supreme Court discussed the matter of the weight to be given examiners' determinations in *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474. The Court observed:

"We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial' evidence' standard is not modified in any way when the Board and its examiner disagree. . . . The significance of his report, of course, depends largely on the importance of credibility in the particular case." 340 U.S. at p. 496.

Subsequently, in *F.C.C. v. Allentown Broadcasting Co.*, 349 U.S. 358, the Court, by necessary implication, warned against too broad a construction of what it had said concerning the importance of examiners' reports even in the

Universal Camera case. In *Allentown* the Commission had rejected its examiner's recommendation of award of a construction permit to one applicant and denial to another. The Court of Appeals had reversed, citing the *Universal Camera* case, in part because of

" its understanding that the Examiner's findings based on demeanor of a witness are not to be overruled by a Board without a 'very substantial preponderance in the testimony as recorded.' "

The Court continued:

"We think this attitude goes too far. It seems to adopt for examiners of administrative agencies the 'clearly erroneous' rule of the Fed. Rules Civ. Proc., 52(a), applicable to courts."

The Court quoted from its *Universal Camera* decision, including the following language:

"The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous.' " 349 U. S. at p. 364.

The Court then cited Section 8 of the Administrative Procedure Act, quoted above, and, reversing the Court of Appeals, remanded the case to it for further consideration.

The proper weight to be given examiners' reports and recommended decisions clearly is that applied by this Court in *American Flint Glass Wkrs. Union v. National Labor Relations Board*, 97 U.S. App. D. C. 244, 230 F. 2d 212, certiorari denied, 351 U.S. 988, where, relying on the *Allentown* case, an order of the Board was affirmed although the Board had found it necessary to reverse its examiner.

In the light of the foregoing, it seems evident that the Board in the present case gave the examiner's recommended decision all of the weight to which it was entitled.⁶

As to PFEL's further proposition, that the Board must give its reasons for rejecting "any" of the examiner's findings, it perhaps suffices to say that no such rule of law exists. The proper test, as applied by this Court and the Supreme Court, as well as other courts, is simply that the agency's findings must be sufficiently definite to enable the courts to perform the task of judicial review. *Spiegel v. Public Utilities Commission*, 96 U.S. App. D.C. 307, 226 F. 2d 29, certiorari denied *sub nom. Capital Transit Co. v. Spiegel*, 350 U. S. 904. The leading case is probably *Alabama G. S. R. Co. v. United States*, 340 U. S. 216, where, at pp. 227-228, the Court said:

"As to the contention of appellants that the Commission's order is not supported by essential findings of fact, § 14 (1) of the Interstate Commerce Act, 49 U.S.C. § 14 (1), does not require the Commission to make detailed findings of fact except in a case where damages are awarded. . . . The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report. Of course § 14 (1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order. . . . And the basic

⁶ It seems unnecessary to consider at any length the cases cited in the PFEL brief in this regard. To the extent that *Matter of the United Corp.*, 7 Pike and Fisher, Ad. L. 2d 561 (3rd Cir.) or *Minneapolis-Honeywell Reg. Co. v. Federal Trade Com'n*, 191 F. 2d 786 (7th Cir.), certiorari dismissed, 344 U.S. 206, indicates that greater weight should be given the examiner's report than that stated in the authorities cited above, these two cases are contrary to the main course of the decisions.

findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. . . . Here the Commission found, in conformity to the statute involved, *supra* note 2, that the differentials prescribed are 'justified as reasonable' and 'necessary and desirable in the public interest.' And 'the report, read as a whole, sufficiently expresses the conclusion of the Commission based upon supporting data. . . .' . . . Enough has been 'put of record to enable us to perform the limited task which is ours.' . . ."

Similarly, in *Capital Transit Co. v. United States*, 97 F. Supp. 614 (D.C.), Judge Washington, speaking for a three-judge district court, concluded (p. 621):

"Certainly more than 'Enough has been 'put of record to enable us to perform the limited task which is ours.' ' Alabama Great Southern R. R. Co., et al. v. United States, 340 U. S. 216 . . . And the Administrative Procedure Act does not require detailed findings of every subsidiary evidentiary fact. So long as the agency makes amply clear the factual basis upon which it has proceeded, there can be no ground for complaint. Here the facts and policies upon which the Commission proceeded are fully set forth. There appears to be no omission in the Commission's statement which is in any way prejudicial to complainant. There is not lacking any element, either as to findings of fact or considerations of policy, necessary to support the present order of the Commission. The requirements of section 8 (b) of the Administrative Procedure Act were satisfied . . ."

What remains, then, is a review of the Board's decision to determine whether enough was said to enable the Court

to perform its reviewing task, and whether what was said has warrant in the record and a reasonable basis in the law.

To this we now turn.

III. The Board's Decision Has Warrant in the Record and a Reasonable Basis in Law: Its Findings and Conclusions Support Denial of PFEL's Application.

We proceed with a review of the critical determinations of fact and law, as set forth in the Board's Report, which led to the denial of the PFEL application.

Purpose and Application of Section 805 (a). The Board properly undertook consideration of the case with that "special concern for the protection" of the domestic operator which impelled Congress to include Section 805 (a) in the 1936 Act. Pointing out that "doubts should be resolved" in favor of protection, the Board cited its own prior decisions to this effect (Report, pp. 15, 18.) The background and legislative history of the section, as well as its terms, warrant, and in fact compel, the position consistently taken by the Board. We will not repeat that background and history here but adopt what is set forth in this regard in Maritime counsel's brief before the Court, Point II, A. Suffice it to say that the Farley and Black reports both condemned the diversion of grants made under the former ocean-mail contracts from foreign commerce into the domestic trades. Congress legislated in 1936 with this problem squarely before it.

The unfairness and prejudice to the objects and policies of the Act contemplated by the section stem, of course, from the payment of operating subsidy to the applicant (Tr. 2602-06, 2798-99), to which may be added the construction subsidy provided by Title V of the 1936 Act (Tr. 2606-07; Ex. 25, p. 5; Tr. 2614), the reserve funds and tax benefits provided by Title VI (Tr. 1381-87, 2609-10, 2639-40; Ex. 25,

pp. 6-8), and various other forms of Government aid properly available only with respect to foreign commerce (Tr. 1149, 6966; Ex. 25, p. 10). Such unfairness and prejudice become apparent in a case such as this, where PFEL, as found by the Board, "is primarily a subsidized operator in the foreign commerce of the United States, and even if granted permission to provide its requested service to Hawaii, its operations would continue to be primarily in off-shore [foreign] services." (Report, p. 16; Tr. 924, 1152, 1158, 2619, 2622-23, 6981-82.) Indeed, it is perhaps not too much to say that PFEL would not even be in existence but for the payment of operating subsidy. During the period January 1, 1953 to April 30, 1955, subsidy payments to PFEL exceeded by \$1,346,000, its consolidated net income. (Tr. 1237, 1400-01, 2606; Ex. 25, pp. 3, 28.)

In this connection, PFEL's brief complains that the Board failed to make specific findings negating the Examiner's findings that (a) no objection to PFEL's application has validity other than the objection that PFEL receives operating subsidy; (b) the receipt of such subsidy would not have an unfair impact on Matson; (c) Matson rather than PFEL would have the advantage in obtaining cargo; and (d) Matson's witnesses admitted that PFEL's subsidy would not permit it to obtain more cargo in competition with Matson than it could obtain without subsidy. (Br., pp. 13-14.) Such argument scarcely requires answer by us, let alone by the Board in its decision.

It is true, of course, as to (a), that Matson's objection has as its legal basis under Section 805 (a) the fact that PFEL does receive operating subsidy. As to (b), the entire Report of the Board, applying faithfully the statute, demonstrates the unfair impact on Matson of subsidized competition. And as to (c) and (d), it is self-evident—but for the purposes of this case without significance—that a carrier like Matson, which has been in the trade for 75

years, would have at least an initial advantage in obtaining cargo (Tr. 2234), and that the fact PFEL receives subsidy would not in itself influence a particular shipper one way or another. The significance of the subsidy is that it enables PFEL to enter its bid for the available cargo, a portion of which it is bound to obtain (Tr. 2603-04, 2614-23, 2631).

Matson Is Entitled to the Protection of Section 805 (a). The Board denied the application on the grounds both that PFEL's subsidized competition would be unfair to Matson and that it would be prejudicial to the objects and policies of the Act. (Report, p. 20.) The Board might have rested decision solely on the latter of these two grounds, without regard to whether or not Matson, in the language of Section 805 (a), operates "exclusively in the coastwise or inter-coastal service". However, the Board went further and found that in its California-Hawaii service, Matson "clearly operates 'exclusively' in the domestic service.", within the meaning of the statute. (Report, p. 14.) This finding the Board made over PFEL's objection based on the fact that Matson also operates a Pacific Northwest-Hawaii service, which includes calls at British Columbia (Ex. 3, Item 7, pp. 2, 4; Tr. 2299), and that Matson has a wholly-owned subsidiary (Tr. 2630-31), The Oceanic Steamship Company (hereafter called Oceanic), which operates between the West Coast of the United States and Australia in foreign commerce (Ex. 61, pp. 5-6; Tr. 3336).⁷ PFEL's objections are renewed at some length in its brief before this Court (pp. 23-29).

In holding that with respect to the California-Hawaii

⁷ It is true that Oceanic, as stressed by PFEL (Br., p. 29), also has permission to service Hawaii in domestic commerce. In fact, no Oceanic cargo vessels had called at Hawaii in domestic commerce for several years (Tr. 2440-42, 2656), the energies of that company being properly absorbed in maintaining the Australian service.

service Matson is operating "exclusively" in the domestic trade within the protection of Section 805 (a) (Report, p. 14), the Board was applying its own precedents, established in cases decided before the present controversy arose. *American President Lines, Ltd.—Subsidy, Route 17*, 4 FMB-MA 488, 501; *American President Lines, Ltd.—Section 805 (a) Application*, 4 FMB-MA 436, 440; *American President Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 FMB-MA 457, 470. The holdings in the present and in the prior cases seem clearly correct and certainly a reasonable application of the statute. The overriding purpose is to protect the domestic service against subsidized competition. That the domestic operator may also conduct a service in foreign commerce is irrelevant to the public interest in protecting and preserving the domestic service.

The Tests Consistently Applied by the Board. In the *American President Lines* cases, cited above, the Board as to Section 805 (a) stated and applied the principle that a subsidized operator should not be permitted to deprive a regular domestic carrier of cargoes (a) which the domestic carrier had the capacity to carry and for which it was providing an adequate service, (b) which the domestic carrier needed in order to maintain the service without Government aid, and (c) to which it could be fairly said the domestic carrier was entitled *as against* subsidized competition. The Board cited these prior decisions in this connection (Report, p. 18), and its decision carefully applied these tests. The logic of the Board's reasoning in the present and prior cases seems unassailable. If the domestic carrier does not have the capacity or is otherwise not providing an adequate service, it can hardly object to the granting of the application. Similarly, if it does not need all of the available cargo in order to maintain its operation on a satisfactory basis, it perhaps cannot be heard to object. On the other hand, if the domestic carrier does have the

capacity and is providing what on any fair test can be deemed an adequate service, and does need the cargo in order to maintain the service, it follows that the domestic carrier is fundamentally entitled to the cargo as against a subsidized competitor.

The PFEL brief, at pages 15-16, surprisingly relies upon the Examiner's ill-founded assertion that Matson is not "fundamentally entitled" to carry the available cargo as against PFEL because, as the Examiner stated, "If the contention were correct, no subsidized line could enter the trade. This, obviously, was not intended by Congress in enacting Section 805 (a)." PFEL complains that the Board found that Matson is "fundamentally entitled" to the available cargo "without mentioning the Examiner's finding."

The answer to PFEL seems obvious. The Examiner's "finding" was utterly at war with the prior decisions of the Board, which had used the very expression "fundamentally entitled". As the Board had held in the prior cases, Congress intended in enacting Section 805(a) precisely the protection of the domestic operator as against subsidized competition which the Examiner rejected. This single "finding" of the Examiner, alone, is sufficient to cast grave doubt upon his understanding of the issues and the validity of his conclusion that the application should be granted.

Matson's Capacity to Carry the Available Cargo; Adequacy of Its Service. As to Matson's capacity to carry the available cargo and the adequacy of its present service, the Board made detailed findings. Acknowledging that at the time of the hearing Matson had serviced Hawaii in domestic commerce for some 73 years, the Board pointed to Matson's investment of \$30,000,000 of its own funds in freight vessels fitted to service this trade (Ex. 3, Item 6; Tr. 2600, 3336, 7017), and over \$5,000,000 in shore facilities and equipment (Ex. 3, Item 11; 2482, 2484, 2486, 2511-12, 2515, 2516-17, 2521, 2522, 2526). In addition, the Board found

Matson has assumed substantial obligation with respect to shore facilities and equipment (Ex. 3, Item 11; Tr. 2482, 2515, 2526), and maintains a continuous research program for the study of new and improved methods and facilities for handling, caring for and transporting cargo in the Hawaiian trade (Tr. 2777-79, 6952, 7373-76). Report, pp. 8-9.)

Also, the Board analyzed the various services provided by Matson, with particular reference to the two services between California and Hawaii and between the Pacific Northwest and Hawaii, listing the number and type of vessels committed to these services and their frequency. (Report, pp. 7-8; Ex. 3, Item 7; Tr. 2299.) Expressly referring, among other matters, to the claimed need for additional service at Longview, Washington, Astoria, Oregon, and Stockton, California, the Board found:

“While certain shippers have requested more frequent service and more cargo space at particular times, the record shows that most shippers are satisfied with the Matson service.” (Report, p. 9; Tr. 52, 585, 757, 768, 797, 830-39, 880, 884, 1057, 1071, 1952, 2333, 3504, 3783, 3799, 3893-94.)

The Board also found that:

“Utilization of Matson sailings outbound have ranged from about 80% in 1950 to about 90% in the first 6 months of 1955. In each year there has been substantial unused underdeck, deck and reefer space, and there have been times when Matson cargo vessels were withdrawn due to insufficient cargo.” (Report, p 9; Exs. 69-75, Ex. 3, Items 13-15; Tr. 3246.)

This finding, it will be seen, is of marked significance because it shows that more vessel capacity than needed is already available for the trade.

The Board concluded its careful analysis of the record in this regard with the following:

“The record shows that while certain shippers have indicated that particular cargoes have sometimes been refused for a particular sailing, and that certain shippers desire more service to Stockton and broader port coverage, the record as a whole supports a finding that the great majority of shippers have been adequately served by Matson. Though particular sailings have been full and cargoes have on limited occasions been held for a later sailing, there has been available excess free space on most Matson sailings and vessels have at times been withdrawn from this service for lack of cargoes. The record supports a finding that Matson has had sufficient capacity to adequately serve the trade, and will continue to provide sufficient capacity to meet the needs of this trade in the foreseeable future. The record fails to show the need for service in excess of that presently provided by Matson and other existing operators.” (Report, p. 17.)

With respect to adequacy of Matson's service, availability of space and general shipper satisfaction, the foregoing findings of the Board are supported by a wealth of evidence, consisting of both oral testimony and exhibits. Additional illustrative record references are Exs. 71, 74, 75; Tr. 1454, 1463, 1831, 1952, 2333, 2505, 2663, 2851, 4035, 4181, 4212, 4490, 4566-67, 4572, 4574, 4753-54, 4955, 4957, 4969, 5085, 5125-26, 5347, 5356, 5650, 6196, 6218, 6241, 6244, 6286, 6295-96, 6684, 6744.

PFEL's brief does not attempt by detailed reference to the record to establish that the Board's findings and conclusions are without adequate support. Instead, it resorts to the technique simply of citing scattered statements to

be found in the Examiner's recommended decision, followed in each case by the familiar complaint that the Board did not agree with the Examiner. PFEL's argument in this regard is incorporated under Point I of its argument (Br., pp. 9-18), which is limited to the proposition that the Board failed to attach due weight to the Examiner's views, to give an adequate statement of its own findings and conclusions, etc.

For example, PFEL asserts, without any reference to the pertinent evidence, that the Board "emasculated" the Examiner's statements indicating the need for service, or additional service, at Longview, Astoria and Stockton (Br., p. 15). Speaking in generalities, the Examiner said, "Service from Longview is needed and has been requested." (Rec. Dec., pp. 7-8.) What the Board found, with full support in the evidence, was that "One shipper indicated a movement of 150 to 250 tons of paper a year from Longview to Hawaii, and 10 to 15 tons would be available for a particular call." (Report, p. 9; Tr. 880-87.) It will thus be seen that the Examiner's statement not only gave an erroneous impression as to the demand for service but ignored the economic feasibility of a carrier stopping to pick up such a small quantity of cargo rather than requiring it to be offered at Portland (Tr. 7045-46).

Similarly, with respect to Astoria and Stockton, which the Board discussed in its Report, the Examiner considered the matter solely from the standpoint of the convenience of the shipper, without any regard whatsoever to economic feasibility (Tr. 7044-45, 7049-51). As PFEL and the Board well know, there is a certain element of distortion in referring to the need for service at various points unless the factor of economic feasibility is taken into account. The same practical considerations which, for example, have deterred Matson from stopping at Longview for 15 tons of

cargo or which have limited Matson service at Stockton to a 21-day frequency would likewise apply in the case of any other carrier. In seeking permission to engage in the Hawaiian trade under Section 805(a), PFEL offers no assurance whatsoever that it would provide a service anywhere approaching the adequacy of Matson's service, or, indeed, that it would even continue in the trade at all when a more profitable use of its vessels appeared to exist elsewhere in the world.

Likewise, PFEL dislikes the Board finding as to the free space existing on Matson's vessels, ranging, as the Board found, from about 20% in 1950 to about 10% in the first 6 months of 1955 (Report, p. 9; Br., p. 16). The Examiner's finding upon which PFEL relies was distorted in excluding free space on ballast voyages or shuttle ships contrary to a prior Board decision (*American President Lines, Ltd.—Subsidy, Route 17*, 4 FMB-MA 488, 505), in fastening upon the first 6 months of 1955 (when additional cargo was available because of a longshoreman's slowdown in the concluding months of 1954) (Tr. 6988; Ex. 3, Item 58, p. 5; Tr. 6986) and, most obviously of all, in his assertion that "for all practical purposes, there was maximum utilization" of Matson's vessels (Tr. 6970).

In Table I of the appendix to this brief we set forth an illustrative computation, derived from the figures in evidence, showing the degree of utilization of Matson vessels in the California-Hawaii service over a five and one-half year period.

Matson's need of the cargo from a revenue standpoint; impact of PFEL's proposed diversion of cargo. On the question of Matson's need of the available cargo in order to maintain a satisfactory service, without Government aid, the Board made detailed findings. Its ultimate finding was that "the diversion of the volume of cargo which

PFEL would carry would seriously jeopardize Matson's vessel replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service." (Report, p. 18.) Referring to Matson's vessel replacement program as requiring an investment of at least 100 million dollars, the Board observed:

"Even at present voyage profit levels the replacement of vessels for Matson is a serious problem. It would be aggravated by approval of the PFEL application." (Report, p. 17.)

The Board recognized that Matson operates "at only a modest profit", averaging but 38 cents per revenue ton for the five-year period, 1950-1954. (Report, p. 16.) It found that "PFEL expects to carry" approximately 2500 tons per voyage from the Pacific Coast to Hawaii and from 4,000 to 5,000 tons per voyage from Hawaii to the Pacific Coast, on 36 voyages per year. (Report, p. 16.) In passing, it should be noted, as the record establishes without contradiction, that the outbound 2500 tons would (on the cubic measurement basis used for this type of cargo) amount to 4,000 revenue tons; that PFEL seeks permission to carry an unlimited tonnage, acknowledging that it will endeavor to fill its ships to their capacity of 8,500-10,000 tons inbound; and that, taking into account only the lower reach of the conservative figures used by the Board, PFEL's cargo diversion from Matson would amount to 288,000 revenue tons per annum.⁸ (Tr. 909, 1012-13, 1037, 1147, 2592.) This tonnage, as we point out below, amounted to somewhat in excess of 10% of Matson's Pacific Coast-Hawaii carryings in both directions for the five-year period, 1950-54; and the diversion would reduce Matson's gross

⁸ 4,000 revenue tons outbound and inbound equals 8,000 revenue tons, which multiplied by 36 round voyages produces the 288,000 revenue tons.

and net voyage profits in greatly increased percentages. The Board concluded "that although the PFEL competition may divert less than 10 percent of the tonnage in this trade, the diversion of Matson's revenues may be substantially greater." (Report, pp. 16-17.)⁹

(1) *Impact of cargo diversion on Matson's earnings.* The record contains full data supporting the Board's findings as to the serious effect of the proposed cargo diversion upon Matson's earnings from its Pacific Coast-Hawaii freighter services. For the five-year period, 1950-1954, Matson's average net earnings from these services, after overhead and taxes, was \$1,035,456, or 38 cents a ton on the 2,694,899 tons annually carried (Ex. 3, Item 16; Ex. 86). An annual diversion of some 10.7% or 288,000 tons of this cargo would translate itself into a 33.2% reduction in gross voyage profit and a 73.8% reduction in the net earnings referred to above. Such a diversion would drastically cut the modest profits made from the California-Hawaii service and increase substantially the net loss already existing in the Pacific Northwest-Hawaii service, which did not even earn full depreciation on the vessels employed (Tr.

⁹ In this connection the Board also found that PFEL would "skim the cream" in this trade, pointing out that PFEL would provide direct service to Honolulu, and to the Hawaiian outports "only if sufficient cargoes offer", whereas "Matson, the primary and historic carrier in this trade, must continue to provide the necessary, and more costly, direct service to the Hawaii outports, regardless of the volume of cargoes carried." (Report, p. 16.) PFEL attacks the Board's "skim the cream" reference, pointing out that the Examiner failed to make such a finding. (Br., p. 17.) The Board seems right, on the grounds it gave. Moreover, it stands to reason that PFEL, with its primary interests involved in the Far East trade, would dip into the Hawaii trade only to the extent that it found it profitable to do so. It seems an inevitable conclusion that if PFEL failed to "skim the cream", it would abandon its Hawaiian service, as it would be perfectly free to do notwithstanding the granting of the application.

2781). Table II, included in the appendix to this brief, shows these results in tabular and graphic form.¹⁰

At the time the taking of evidence concluded complete figures were available only through 1954, with interim figures for the first six months of 1955. The Board therefore confined its analysis of the impact of PFEL's proposed cargo diversion on Matson's earnings to the five-year period ending with the full year, 1954. (Report, pp. 16-17.) PFEL does not appear to contest the validity of the Board's analysis as applied to this period, but complains that the Board failed to take into account a rising trend in the cargo available. Going outside the evidence in this proceeding, the PFEL brief thereupon purports to state the 1955 and 1956 tonnage carried by Matson, relying on statements made at the oral argument before the Board and a portion of an examiner's initial decision in a 1957 rate proceeding to which Matson was a party, FMB Docket No. 808. (Br., pp. 41-43.)

We believe that PFEL's tactics in this respect will be disapproved by the Court and no reliance placed upon such data from outside the record. As a matter of fact, following the Board's decision of May 10, 1957, PFEL's petition for reconsideration (p. 3) requested, alternatively, a reopening of the record and further hearing to show, among other things, "Pacific Coast/Hawaii traffic statistics for the years 1955, 1956 and 1957 (to the extent available)." As we have seen, the Board denied the petition on July 29, 1957 (followed by no petition by PFEL to this Court from such denial).

¹⁰ Matson's Ex. 86 gives a complete record of the tonnage carried, gross and net earnings and the impact of the cargo diversion year by year for the five-year period, 1950-1954. On the basis of these figures, Matson's comptroller pointed out with respect to the Pacific Coast-Hawaii services that revenue tons of cargo lost by Matson resulted, percentagewise, in a loss of gross voyage profit approximately three times as great, and a loss of net profit approximately seven times as great. (Tr. 2587.)

The practical unfairness of such tactics to Matson arises from the fact that it has been afforded no opportunity to produce evidence telling the full story for the years following 1954. As tonnage increases, for example, it can only be anticipated that PFEL's cargo diversion from Matson would increase. Equally or more important, the figures recited by PFEL do not show Matson's earnings for the years 1955, 1956 and to date. The record does show that Matson's carryings for the first six months of 1955 amounted to 1,493,903 revenue tons (which exceeds $\frac{1}{2}$ of the 2,688,607 revenue tons carried in 1954, which in turn was slightly lower than the average annual tonnage for the five-year period, 1950-54) (Ex. 3, Item 16; Tr. 2841). The unreliability of such tonnage figures, standing by themselves, is demonstrated by the fact, which is of record, that Matson's net revenue per ton for the first six months of 1955 dropped to 36 cents from the five-year average of 38 cents (Tr. 2584). PFEL fails to mention these figures.¹¹

As we have seen, the Court may not take judicial notice of scraps of evidence introduced in separate proceedings and outside of the record in this case. It may well be, however, that the Court can properly take judicial notice of the Board's ultimate official action in the 1957 rate proceeding, above mentioned, FMB Docket No. 808, which followed an exhaustive analysis of the earnings of Matson and the other carriers in the Hawaiian trade. That action took the form of the Board's decision of December 9, 1957, and granted the requested rate increases to all of the Hawaiian carriers.

¹¹ Even on the increased tonnage figures for 1955 and 1956 stated by PFEL, and even assuming a diversion of no more than the 288,000 tons per annum above referred to, the 1-3-7 ratio (*supra*, fn. 10) produces an interesting result. It indicates a loss in Matson's gross and net profits for 1955 of 27% and 63%, respectively, and for 1956 of 25.5% and 59.5% respectively. This follows mathematically from applying the ratio to the tonnage figures stated by PFEL.

(2) *Impact of decreased earnings on Matson's replacement program.* Curiously, PFEL does not attack the portion of the Board's finding to the effect that PFEL's proposed diversion of cargo "would impede the proper development and continuation of Matson's California/Hawaii service" (Report, p. 18), but centers its fire on the first part of this finding to the effect that the diversion of cargo "would seriously jeopardize Matson's vessel replacement program" (Br., pp. 32-45). PFEL's argument as to the impact of such diversion (Br., pp. 41-43), discussed above, appears under its "replacement program" argument. It is curious, as we say, that PFEL so directs its argument because the case would have been decided, it would seem, without any reference to a replacement program. It is enough that the impact of PFEL cargo diversion on Matson revenues would seriously injure the proper development and continuation of the service. However, PFEL's contention in this regard is without substance in the evidence.

Matson's present freighter fleet consists of vessels built between 1943 and 1945 (Ex. 3, Item 5, Tr. 2597-2600), and will soon reach the 20-year age which PFEL acknowledges to be the generally-accepted measure of economic life (Br., p. 39). Matson has been in business 75 years and the record does not indicate that it plans other than to continue in the trade; replacement of the fleet is therefore a necessity. Matson's Research Department, in conjunction with outside assistance, has been studying new and improved methods of moving cargo to and from Hawaii in units, containers, vans and by other methods. Substantial progress has been made and costs are being computed (Tr. 2777-78, 6952, 7373-78).

Matson's comptroller testified that at today's prices replacement of the vessels used in the Pacific Coast-Hawaiian freighter services would cost from 120 to 160 million dollars (Tr. 2783-85). PFEL did not introduce contradictory

evidence, and in cross-examining this witness, used a replacement cost of 140 million dollars and an obligation of 100 million dollars remaining after a 25% down payment (Tr. 2787-88). Certainly the Board is expert in calculating replacement costs. Its figure of "at least 100 million dollars" (Report, p. 17) cannot be successfully contradicted.

As we have seen, the vessels in the Pacific Northwest service did not even earn depreciation during the five-year period on which full results are available (Tr. 2600-01, 2781, 6981), and the California service presents a "border-line" situation so far as vessel replacement is concerned (Tr. 2601). The Board's finding that the proposed cargo diversion would "seriously jeopardize" the replacement of the vessels is no flight of fancy.

PFEL (Br., pp. 14-15, 35-36) confuses the obvious distinction in meaning between "seriously jeopardize" and "prevent", arguing that no Matson witness would say that such cargo diversion would "prevent" replacement. It then gives its argument the surprising twist (Br., pp. 33-40) that PFEL's cargo diversion would be an insignificant factor because the replacement of Matson's fleet will not be economically feasible in any event.¹² The replacement of Matson's freighter fleet will depend, of course, upon the future of its services and the question of whether the replacement vessels can be profitably operated. It would appear that the Board gave PFEL's argument on this score all of the weight to which it was entitled.

¹² At p. 40, footnote 41 of its brief, PFEL repeats the error which it made on two prior occasions before the Board in comparing as equals two unlike figures. The figures in evidence supports Matson's estimate that it would take 46.4 years to accumulate sufficient earnings to replace its fleet, assuming denial of PFEL's application and continued earnings at the 1950-1954 level. Matson estimated, on the same level of earnings but if the PFEL application were granted, it would take 69.2 years to accumulate earnings sufficient to replace its fleet. PFEL's 46.4-50.4 comparison is without any fair basis in the evidence.

Lack of significance of the Matson-Oceanic relationship.

The Board carefully considered the contention, strongly pressed by PFEL both before the Board and now before this Court, that Matson's Hawaii service should be denied the protection of Section 805 (a) because Matson owns all of the shares of another corporation, Oceanic, which presently receives operating subsidy with respect to its Pacific Coast-Australia passenger and freighter services. (Br., pp. 24-32.) Here also the Board was not content to decide the case by resort to abstract propositions or sweeping generalities, but carefully considered the facts.

Matson has served the Hawaii trade for many decades before acquiring, in 1926, its stock interest in Oceanic, which in 1937 obtained operating subsidy for the service to Australia. Matson's initial investment of \$1,500,000 in Oceanic was followed by a further investment in the same amount (Tr. 2631, 2644) and later, at the Board's insistence, Matson committed itself to an additional \$3,000,000 investment (Ex. 61, pp. 4-5; Tr. 3336). Over a period of some 30 years, since its initial investment, Matson has never taken a penny in dividends out of Oceanic (Tr. 2644). The Matson-owned vessel tonnage engaged in non-subsidized domestic freight operations exceeds that of Oceanic on a ratio of 6 to 1 (Tr. 2722). In Matson's case, its domestic operations have supported the foreign trade operations. In stark contrast, PFEL's owned tonnage in subsidized operations would exceed the owned tonnage which it proposes to employ in the Hawaii service on a ratio of about 3 to 1 (Tr. 2605-06, 2721-22). In PFEL's case, it is a fair appraisal that the subsidized foreign operations would support the domestic operations (Tr. 2630-31, 2719-20).

With these facts, among others, before it the Board squarely dealt with and rejected PFEL's contention. The

Board stated that although Matson's subsidiary, Oceanic, is a subsidized carrier,

"the record shows that Matson is primarily a domestic unsubsidized operator. There is nothing in the record which indicates that Matson's domestic Hawaii service has been supported by Oceanic subsidy." (Report, p. 16.)

In contrast, the Board pointed out that "PFEL is primarily a subsidized operator in the foreign commerce of the United States" and would remain so even if the application were granted. (Report, p. 16.) To assert, as did the Examiner, that "PFEL receives no benefit as a subsidized line that is not available to Matson through Oceanic" (PFEL Br., p. 13) is, as found by the Board, completely without support in the record.

PFEL's contention, that Matson's Hawaii service should be denied the protection of Section 805 (a), also collides with the terms of the statute. That section, as we have seen, requires the Board to grant permission for operations in domestic commerce in the single situation where the subsidized operator or its parent or affiliate were engaged in such operations in 1935, under the further limitations therein provided. As the record establishes (Ex. 3, Item 1, Ex. 59; Tr. 2478, 2497), the Board was bound to grant Matson permission to maintain its Hawaii service by virtue of this "grandfather rights" provision. Interestingly enough, the Examiner indicated his concurrence with Matson as to this (Rec. Dec., pp. 11-12), although the Board found it unnecessary to mention the point.¹³

PFEL was not, of course, engaged in the Hawaiian domestic service in 1935 and, therefore, is not in a position to take advantage of the "grandfather rights" exception.

¹³ An unfriendly critic of PFEL's counsel might point out that this finding of the Examiner is one of those not mentioned in their brief.

On this background, it will be seen that what PFEL is really contending for is a construction of Section 805 (a) which would require that when in any trade grandfather rights are recognized for one carrier, they must be granted to all. This is the necessary effect of PFEL's argument that Matson, notwithstanding its grandfather rights entitlement, is to be denied the protection of the section. The statutory language simply does not permit of any such construction.

Conclusion. On the whole record, therefore, the Board concluded that Matson was "fundamentally entitled" to the available cargo in the Hawaii service as against the competition of a subsidized operator. (Report, p. 18.) Its decision in this regard had warrant in the record, its conclusions are sound in law, and its detailed and ultimate findings and conclusions amply sustain denial of the application.

IV. The Board Properly Disposed of All the Issues Raised Before It.

PFEL's claim that the Board "discriminated" against it (Br., pp. 46-47) is effectively answered in Maritime counsel's brief, Point III, D. We concur in the view that what PFEL is really complaining about is that the Board consistently applied its precedents and refused to discriminate in PFEL's favor.

There remains for consideration PFEL's contention that the Board failed properly to dispose of two issues raised before it, namely, (1) that Matson's present Hawaiian service is unlawful and that hence Matson lacks standing to contest the application, and (2) that the Board failed to pay proper heed to the policies of the antitrust laws. (Br., pp. 18-23.) The first of these issues the Board deemed

"irrelevant" to the proceeding before it (Report, p. 15); as to the second, the Board's decision, we submit, fully and amply disposed of the issue, although not, to be sure, in a manner to PFEL's liking.

PFEL was given full opportunity to present all the evidence which it desired bearing upon both issues and to present argument to the Examiner and to the Board. There is no basis for the contention that the Board failed to give both issues all of the *consideration* which they deserved. Moreover, PFEL's brief before this Court does not seek to establish, with appropriate record references, either that Matson's present service is unlawful or that Matson is presently violating the antitrust laws, either of which claims, if made, we would, of course, emphatically deny. PFEL, rather, merely lists its arguments before the Board and then complains at the Board's disposition of them, citing Section 8(b) of the Administrative Procedure Act in purported support of its contention that the Board was bound to make full findings on both issues. The PFEL contention to be considered under this point is, hence, a narrow one.

1. The Board stated fully PFEL's contention as to the illegality of Matson's present operation, and properly rejected it as "irrelevant". The Board took this course although, in fact, the record shows, as the Examiner recognized, that Matson has "grandfather rights" in the Hawaiian service. The Board's treatment of the issue was correct because Section 805(a) gives the Board no authority whatsoever to prohibit or fail to protect the domestic services which this section and the Act, in general, are designed to foster. The sanction of Section 805(a), on the contrary, is brought to bear solely upon the subsidized operator. "It shall be unlawful to award or pay any subsidy", the section provides, to any contractor if it or its parent company or affiliate are engaged in the domestic trade without written permission. Withholding of subsidy payment is the means of enforcement.

Accordingly, the question which PFEL seeks to inject into the proceedings could only be raised upon proper notice in a proceeding to which Oceanic, the receiver of the subsidy, is a party. PFEL both failed to cause notice to be given of any such issue and failed to bring in Oceanic as a party. The Board was clearly right in deeming the issue "irrelevant".

2. PFEL's sweeping claims as to the anti-trust laws likewise lack basis. The question in such cases is one of accommodating the policies of the antitrust laws to the scheme of the regulatory statute. *McLean Trucking Co. v. United States*, 321 U.S. 67, and *Isbrandtsen Co. v. United States*, 93 U.S. App.D.C. 293, 211 F. 2d 51, *certiorari denied*, 347 U.S. 990, go no further than this. Certainly no case holds that an agency such as the Board is bound to convert proceeding such as this into an antitrust case.

Perhaps the case closest in point is *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, where the Court reversed the Federal Communications Commission for the reason that it had placed excessive emphasis on "competition" and not enough on the standard of "public interest" provided by the controlling statute. Here, likewise, Section 805(a) is designed not to encourage but to suppress the "unfair competition" between unaided and subsidized operators.¹⁴ And see *American Overseas Airlines, Inc. v. Civil Aeronautics Board*, decided by this Court January 23, 1958.

¹⁴ The PFEL brief (p. 20) cites the decision of the three-judge district court in *Breswick & Co. v. United States*, Civ. 101-114, 7 Pike and Fisher, Ad. L. 2d 522 (S.D., N.Y.). The relevance of that decision, which applied complex provisions of the Interstate Commerce Act, is not clear. Any claim of relevance would seem to be removed by the Supreme Court's summary reversal of the district court on January 27, 1958. *Alleghany Corporation v. Breswick & Co.*, Nos. 616, 617 and 618, October Term, 1957.

We have examined all of the other cases cited by PFEL in this connection. None is sufficiently close in point to be helpful either to the parties or to the Court.

The short answer is that the Board both received evidence as to alleged antitrust law violations, permitted full argument upon the issue, and made numerous findings directly bearing upon the existing competitive situation in the Hawaiian trade. (Report, pp. 6-9, 10, 19.) Enough was said, surely, to show that it disagreed with PFEL's contention and the bases therefor. Our discussion of this point and this brief may appropriately conclude with the final paragraph of the Board's discussion:

Matson is the predominant carrier in the Pacific Coast/Hawaii trade, and we recognize that such a carrier should not be protected from free competition. Denial of PFEL's application does not protect Matson from such competition. Any *unsubsidized* U. S. flag carrier may at any time and without restriction or permission from this Board, enter into competition with Matson in this trade. (Report, p. 19; emphasis the Board's.)

Conclusion

The petition should be dismissed for want of jurisdiction. If, on the contrary, jurisdiction has been properly invoked, the Court should determine that the Board's decision has warrant in the record and a reasonable basis in law, and that its findings and conclusions are adequate to support denial of the PFEL application.

Respectfully submitted,

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February 7, 1958.

APPENDIX

Section 2 of the Act of December 29, 1950, c. 1189, 64 Stat. 1129, as amended, 5 U.S.C. 1032:

“The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402(a) of Title 47, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 210(e), 217a, and 499g(a) of Title 7, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46, and (d) of the Atomic Energy Commission made reviewable by section 2239 of Title 42.

“Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title.”

Section 805(a) of the Merchant Marine Act, 1936, c. 858, 49 Stat. 1985, 46 U.S.C. 1223:

“It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates

any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

“If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whoever shall violate this provision shall be guilty of a misdemeanor.”

Table I

*Utilization of Matson Sailings from California to Hawaii
January 1, 1950 to June 30, 1955*

	Underdeck Space Utilized By General Cargo ¹	Refrig- erated Space Utilized ²	Maximum Deadweight for Additional On-Deck and Liquid Cargo (Tons-2000%) ³	Vessels Withdrawn From Hawaiian Service Due to Lack of Cargo (Vessel Days) ⁴
1950.....	78%	43%	364,148	133
1951.....	87%	66%	286,560	160
1952.....	76%	65%	263,875	430
1953.....	79%	70%	348,784	326
1954.....	79%	79%	343,724	531
1955 (6 mos.).....	88%	77%	194,122	33
Weighted % Utilization for 5½-yr. Period.....	81%	67%	Totals 1,801,213 tons	1,613 days

¹ Exs. 69, 70

² Ex. 70

The carriage of additional cargo would utilize some of the free space for broken stowage around the cargo, and accordingly the percentage of additional cargo which could have been carried would be moderately less than the 19% and 33% free space figures indicated by the Table (Tr. 2943, 3246). Exclusion of the eight sailings in ballast occurring in the five and one-half year period would change 81% to 82%, in the first column.

³ Ex. 74. The actual amount of additional on-deck and liquid cargo which could have been carried would have been limited by the nature of the cargo and its effect on the stability of the individual vessels; hence percentages cannot be given (Tr. 2958-66, 3246).

⁴ Ex. 75; Tr. 2966-67, 3246.

Table II

*Effect of PFEL Cargo Diversion on Matson
(Based on 5-Year Period, 1950-1954)*

*1. Average Annual Results of Matson's Pacific Coast/
Hawaii Services Before Diversion of Cargo to PFEL.¹*

	California/ Hawaii Service	Pacific Northwest/ Hawaii Service	Pacific Coast/Hawaii Services
Number of round voyages.....	101	34	135
Revenue tons of cargo carried...	2,073,131	621,768	2,694,899
Voyage gross profit (before over- head and taxes).....	\$5,030,698	\$ 76,206	\$5,106,904
Voyage gross profit per revenue ton (before overhead and taxes).....	\$ 2.43	\$ 0.12	\$ 1.90
Voyage net profit (after over- head and taxes).....	\$1,376,567	(\$310,484)	\$1,035,456
Voyage net profit per revenue ton (after overhead and taxes).	\$ 0.65	(\$ 0.49)	\$ 0.38

¹ Ex. 3, Item 16; Ex. 86; Tr. 2582-88, 3229-42, 3268-74, 3336. This table is computed from Ex. 86, which gives the results on a year to year basis. The slight variations in the above figures derive from Ex. 86 and are explained in the testimony.

2. *Effect on Matson's Pacific Coast/Hawaii Services of Losing 288,000 Revenue Tons of Cargo Per Year.*

	California/ Hawaii Service	Pacific Northwest/ Hawaii Service	Pacific Coast/Hawaii Services
Average annual revenue tons carried on Matson vessels 1950-54 ¹	2,073,131	621,768	2,694,899
Percentage of total cargo carried.....	77%	23%	100%
Revenue tons of cargo lost ²	221,760	66,240	288,000
Percentage of cargo lost.....	10.7%	10.7%	10.7%
Percentage of voyage gross profit lost (before overhead and taxes) ³	26.5%	100%	33.2%
Percentage of voyage net profit lost (after overhead and taxes) ³	44.9%	100%	73.8%

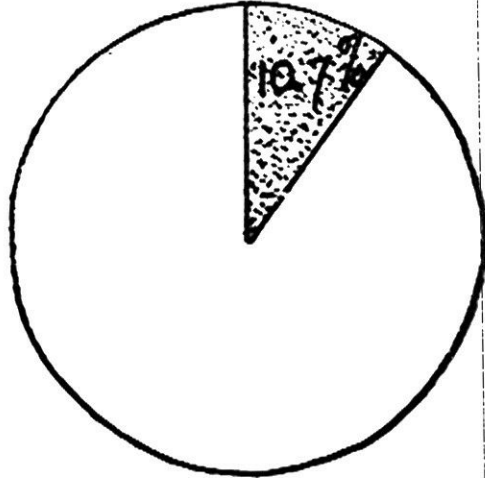
¹ Ex. 86. This exhibit, prepared before the hearing, assumed a cargo diversion of 2,000 revenue tons per Matson voyage, or a total diversion of 270,000 revenue tons per annum. The above table applies the computations contained in this exhibit to a diversion of 288,000 revenue tons.

² 2500 weight tons of cargo moving from Pacific Coast to Hawaii equals 4000 revenue tons. 4000 weight tons of cargo moving from Hawaii to Pacific Coast equals 4000 revenue tons. Total Hawaiian cargo PFEL expects to carry out-bound and inbound on one round voyage therefore equals 8000 revenue tons. And total Hawaiian cargo PFEL expects to carry on 36 voyages per year equals 288,000 revenue tons. (Tr. 909, 1037-39, 1147, 2586, 2591-92, 3266-68.) The total figure of 288,000 has been allocated to the California and Pacific Northwest/Hawaii Services in the proportion that the tonnage carried by each bears to the total carried by both services.

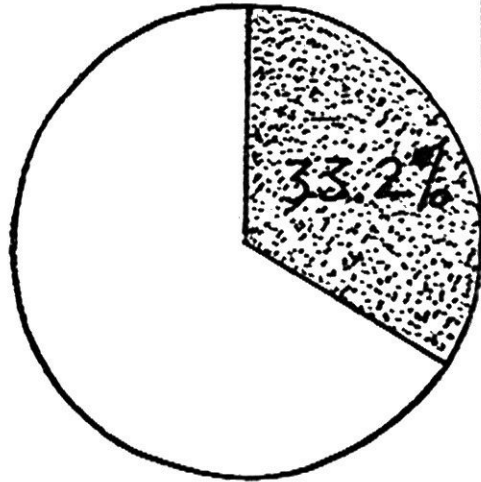
³ Loss of gross and net voyage profit has been computed by applying to the percentage of cargo lost the same relative increase, as shown for the five-year average on Ex. 86. As noted *supra*, p. 37, as applied to the Pacific Coast-Hawaii services the increase percentagewise from cargo lost to decreased voyage gross profit to decreased voyage net profit follows an approximate ratio of 1-3-7.

3. *Graphic Analysis of the Effect on Matson's Pacific Coast/Hawaii Services of Losing 288,000 Revenue Tons of Cargo Per Year.*

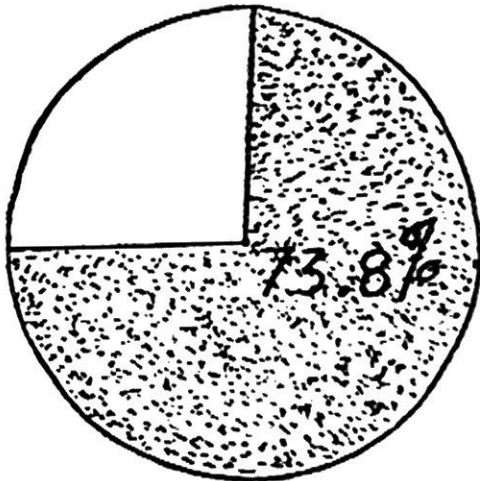
Percentage of Cargo Lost



Percentage of Voyage Gross Profit Lost (Before Overhead and Taxes)



Percentage of Voyage Net Profit Lost (After Overhead and Taxes)



REPLY BRIEF FOR RESPONDENTS FEDERAL MARI-
TIME BOARD, MARITIME ADMINISTRATION, AND
CLARENCE G. MORSE, MARITIME ADMINISTRATOR,
IN OPPOSITION TO BRIEF OF RESPONDENT UNITED
STATES OF AMERICA

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14007

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD,
MARITIME ADMINISTRATION, AND CLARENCE G. MORSE,
MARITIME ADMINISTRATOR, RESPONDENTS

MATSON NAVIGATION COMPANY, INTERVENER

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL MARITIME BOARD

United States Court of Appeals
For the
District of Columbia Circuit

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REPLY BRIEF FOR RESPONDENTS, FEDERAL MARITIME BOARD,
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MARITIME ADMINISTRATOR, IN OPPOSITION TO BRIEF OF
RESPONDENT UNITED STATES OF AMERICA

INTRODUCTORY STATEMENT

Respondent Board's¹ principal brief was filed February 7, 1958. On the same date, respondent United States through the Department of Justice (hereinafter "the Department"), filed a brief which sided with the petitioner in its attack on the merits of the Board's determination. By order of the Court dated February 18, 1958, the Board was permitted to file this reply brief in opposition to the brief of the United States.

On the question of jurisdiction, respondent United States adheres to its original concurrence in the Board's position that

¹ The respondents Federal Maritime Board, Maritime Administration, and Clarence G. Morse, Maritime Administrator, are referred to herein as the "Board".

the subject petition for review, brought under the Review Act of 1950, 5 U. S. C. 1031 *et seq.*, is not authorized by that Act and therefore may not be entertained by this Court.² This brief is accordingly confined to answering the argument of the United States on the merits.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A to the Board's principal brief. For the convenience of the Court, we reprint below Section 805 (a) of the Merchant Marine Act, 1936 (hereinafter the "Act"), and italicize³ those portions which are especially important for determination of the issues raised by the Department.

SEC. 805 (a). *It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or cor-*

² The Department, on page 16 of its brief (hereinafter D. J. brief), states that:

"We adhere to the position previously taken in our concurrence in the Board's motion to dismiss for lack of jurisdiction, namely, that any review of Board orders entered under authority of the Merchant Marine Act, 1936, may be had only in the district courts, and not in the court of appeals. Petitioner has filed suit in the district court seeking review of the same order. However, there the Board (appearing through the Department of Justice) has filed an answer contending, *inter alia*, that its order is not subject to any judicial review. In our view the district court is the proper forum to determine in the first instance whether the Board's order is jurisdictionally reviewable and, if so, whether it is valid."

See also pages 9-21 of the Board's principal brief.

³ Emphasis added throughout this brief.

poration having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission *shall not grant* any such application if the Commission finds *it will result in unfair competition* to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that *it would be prejudicial to the objects and policy of this Act: Provided, That* if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission *shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.*

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

STATEMENT OF QUESTIONS PRESENTED

The questions presented are stated in the principal brief for respondent Board, filed February 7, 1958. The counter-statement of questions presented in the Department's brief is correct except that it inadvertently omits the following stipulated issue:

Whether this Court has jurisdiction, under the Review Act of 1950, 5 U. S. C. 1031, *et seq.*, to review the agency report

which is the subject of the petition for review in this proceeding.

SUMMARY OF ARGUMENT

I. The Department erroneously contends that "unfair competition", as that phrase is used in Section 805 (a), must be limited to mean either (1) the diversion of subsidy funds into domestic operations or (2) conduct falling within the traditional concept of unfair methods of competition. The Department makes no attempt to define the latter, but presumably means practices which violate either the common law or the anti-trust laws.

It is clear, however, that unfair competition cannot possibly mean the diversion of subsidy funds into domestic operations, for such diversion is specifically prohibited by the second paragraph of Section 805 (a), and hence could never in any case lawfully occur.

It is also clear that unfair competition cannot mean practices which violate the common law or the anti-trust laws, for it would require the Board to speculate whether an applicant for permission will violate the law. What constitutes unlawful competition in ocean shipping is spelled out in the Shipping Act, 1916, 46 U. S. C. 801, which displaces the common law and anti-trust laws in this field. To import the latter into Section 805 (a) introduces into ocean shipping a standard conflicting with that enacted in the Shipping Act, 1916, for exclusive application in this field.

The Department's limitation of unfair competition to the diversion of subsidy funds and the use of unlawful methods of competition would require a grant of permission to every applicant who did not disclose an intention to violate the law, and would effectively read Section 805 (a) out of the Act.

The Department's construction is also at odds with the requirement in the grandfather proviso of Section 805 (a) that, once an applicant has been found to qualify for grandfather rights, "the Commission *shall* grant such permission * * * without further proceedings as to the competition on such route or trade." It is, moreover, unsupported by the legislative history, which shows in fact that permission was intended to be sparingly granted.

The Board properly construed unfair competition to include a standard of adequacy of service. That construction gives Section 805 (a) an internally consistent meaning, harmonious with other relevant statutes, and in accord with the legislative history.

II. This matter should not be remanded to the Board for clarification of the finding that the grant of permission would be prejudicial to the objects and policy of the Act.

The Board had no reason to make separate findings of fact in support of its conclusions of "unfair competition" and "prejudice to the objects and policy of the Act"; it was under no legal requirement to do so, and many of its findings support both conclusions.

Nevertheless, it is apparent that the Board's finding of prejudice to the objects and policy of the Act rested on two principal grounds: (1) the existing Pacific Coast/Hawaii service is adequate and would be materially harmed by a new service, and (2) PFEL's competitive impact would jeopardize the vessel replacement program of Matson, operator of the existing service.

The Board found prejudice to the objects and policy of the Act in the light of these facts, and found no countervailing benefits sufficient to support a grant of permission. It therefore properly denied permission.

Matson's predominant position in the Hawaii trade is of no significance in applying Section 805 (a), which section is itself in derogation of competition as between a subsidized and a domestic carrier.

ARGUMENT

Unlike petitioner Pacific Far East Line, Inc. (hereinafter PFEL), whose brief appears to be designed to obscure the statutory issues on the merits, the Department of Justice plainly identifies them. So identified, it will be seen even more clearly that the Board correctly decided such issues.

I

The Board correctly construed "unfair competition"

The Department disagrees with the Board's report chiefly because it believes that the report "rested upon a misconstruc-

tion as to what constitutes 'unfair competition' under Section 805 (a)."⁴ It must be emphasized that the Department does *not* argue that Matson is ineligible to be protected as an exclusively coastwise or intercoastal service within the meaning of Section 805 (a).

The Department contends that "unfair competition," as a ground for refusal of permission under Section 805 (a), must be limited to mean either (1) the diversion of subsidy funds into domestic operations, or (2) conduct falling within the traditional concept of unfair methods of competition (D. J. brief, pp. 7-8, 11, 12). According to the Department, the Board *must* grant permission except where these results are found to ensue. The Department's construction would restrict narrowly the Board's discretion, and it is demonstrably invalid because it would serve to read Section 805 (a) out of the Act.

1. One needs only to read the full text of Section 805 (a) to see that "unfair competition" cannot possibly mean the diversion of subsidy funds into domestic operations. Such diversion is specifically prohibited and made a misdemeanor by the second paragraph of Section 805 (a), which states:

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and who-soever shall violate this provision shall be guilty of a misdemeanor.

It is at once manifest that a denial of Section 805 (a) permission cannot be made to depend upon a Board finding that the subsidized line will thereafter divert subsidy funds into the domestic operation so permitted. Such diversion is in any case absolutely prohibited. If "unfair competition" were to

⁴The only other argument of the Department is that the Board's report does not make separate findings sufficient to support the conclusion that the grant of PFEL's request for Section 805 (a) permission would be "prejudicial to the objects and policy of [the] Act" (D. J. brief, pp. 14-16).

mean only the diversion of subsidy money, it would be a wholly illusory and meaningless standard in view of the fact that such diversion could never lawfully take place.

2. The second category of activity which would constitute "unfair competition" according to the Department, is "practices which come within the traditional ambit of 'unfair methods of competition.'" (D. J. brief, p. 13.) The Department makes no effort to define such practices, but presumably it has in mind practices which violate the common law or the anti-trust laws. Such an interpretation is unacceptable.

The grant of permission under Section 805 (a) is prospective in its effect.⁵ If it depended upon proof of practices falling within the traditional concept of unfair methods of competition, it would have to be given in every case where the record showed no evidence that the applicant intended to resort to such methods. As a practical matter, no applicant would disclose any such intention; at least it would not do so deliberately. Manifestly, the Board is not required to speculate whether the applicant will in the future violate the standards of lawful competition.

The business practices which are illegal in ocean shipping are spelled out in the Shipping Act, 1916, 46 U. S. C. 801, *et seq.*, and that Act, rather than Section 805 (a) of the Merchant Marine Act, 1936, provides remedies for persons injured by practices violative of those standards. In ocean shipping neither common law nor anti-trust law standards of behavior apply; these have been displaced by the standards of the Shipping Act, 1916.⁶ The Department's attempt to equate "unfair competition" under Section 805 (a) with practices which violate the common law or the anti-trust laws, would import into Section 805 (a) a standard which conflicts with

⁵ Section 805 (a) states that permission shall not be granted if the agency finds that "it [the grant of permission] will result in unfair competition." Thus, the statute not only calls for a prospective finding, but also provides that the future "unfair competition" must result from the grant of permission itself, not from the subsequent practices of the applicant.

⁶ *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474 (1932); *Far East Conference v. United States*, 342 U. S. 570 (1952); *American Union Transport, Inc., v. River Plate & Brazil Conferences*, 126 F. Supp. 91 (S. D. N. Y., 1954), *aff'd*, 222 F. 2d 369 (2 Cir., 1955); *United States v. Alaska S. S. Co.*, 110 F. Supp. 104 (W. D. Wash., 1952).

those enacted in the Shipping Act, 1916, for specific and exclusive application in ocean commerce.

The Department's narrow interpretation of "unfair competition" as that phrase is used in Section 805 (a) is therefore erroneous. "Unfair competition" cannot be equated with the diversion of subsidy money into domestic operations for that is absolutely prohibited by the second paragraph of Section 805 (a). And it cannot be equated with "traditionally unfair" competition because this has been superseded in the field of ocean shipping by the Shipping Act, 1916. Methods of competition condemned by the 1916 Act are, of course, prohibited by that statute, just as the diversion of subsidy money is prohibited by the second paragraph of Section 805 (a). If Section 805 (a) permission had to be granted to any applicant who did not intend to indulge in either practice, as the Department urges, such permission would have to be given in effect to *every* applicant.

Equally important, if the Department's construction of "unfair competition" were correct, it would mean that Congress wrote into Section 805 (a) the *mandatory requirement* that the Board permit a carrier with "grandfather rights" to engage in the domestic trade even though that carrier apparently would divert subsidy funds into domestic operations, and even though it apparently would engage in "traditionally unfair" methods of competition. This is so, because the "grandfather rights" provision ⁷ in Section 805 (a) provides that, once the applicant for Section 805 (a) permission has been found to have such rights, "the Commission *shall grant such permission * * * without further proceedings as to the competition in such route or trade.*"

The Department seeks to buttress its view by several references to the legislative history of Section 805 (a). These references wholly fail to support the Department's thesis.

The legislative history cited by the Department is in the main inconclusive. It discloses that in the earlier stages of the

⁷ The grandfather proviso of Section 805 (a) operates to permit the continued operation of any domestic service, even if affiliated with a subsidized carrier, that was in bona-fide operation in 1935, notwithstanding the 1936 Act's conditional prohibition against such operation.

legislative history of the 1936 Act, Congress gave serious consideration to imposing an *absolute* ban against any domestic operation by a subsidized line or its affiliate. The absolute ban first proposed gave way to the tempered prohibition ultimately enacted. If this history shows anything, it shows that permission under the section, being an exception to the general rule that subsidized carriers will be excluded from the domestic trades, should only sparingly be granted. It does *not* show, as the Department seems to contend, that the Board is *required* to grant permission in every case unless it finds that diversion of subsidy or unlawful methods of competition will ensue. As seen, this would open wide the door to unlimited entry by subsidized lines into the domestic trades, and would in effect make Section 805 (a) a nullity.

All the anomalies inherent in the Department's version are avoided by the Board's construction of "unfair competition" as including a standard of adequacy of service.⁸ That construction is the only one which imparts a meaning to Section 805 (a) which is internally consistent and harmonious with the rest of the Merchant Marine Act, 1936, and other relevant statutes. The Board's construction safeguards an exclusively coastwise or intercoastal service against the competition of a subsidized operator unless it can be shown that the service afforded by the domestic carrier is inadequate. The Department recognizes that this is the Board's view:

The Board's rationale is simply that Matson, as a primarily domestic carrier, is 'fundamentally entitled' to retain its monopoly as against a subsidized competitor seeking to enter the trade, unless the latter can show either that the domestic carrier is not rendering adequate service, or that it does not 'need' the cargo which would be diverted. That is not a standard of unfair competition, but of public convenience and necessity (D. J. brief, p. 5).

⁸ The courts treat with deference an administrative agency's construction of the terms of the statute which invests the agency with its administrative responsibilities. *S. E. C. v. Central-Illinois Corp.*, 338 U. S. 96, 126 (1949); *S. E. C. v. Chenery Corp.*, 332 U. S. 194 (1947); *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111 (1944); *Gray v. Powell*, 314 U. S. 402 (1941); *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177 (1938).

The Department's attack upon the "fundamentally entitled" doctrine⁹—that is, the Board's test of adequacy of service—is without merit. It is true that an unsubsidized operator could enter the California/Hawaii trade without permission of the Board and thus divert cargo from Matson. But Congress was not concerned with the unsubsidized operator, who would compete on equal terms with the domestic service, when it enacted Section 805 (a). It was concerned with an operator who, like PFEL in the instant case, has received and been sustained by subsidy benefits from operations in foreign trade, and is thereby better able to initiate and conduct domestic operations in competition with an exclusively domestic service, like Matson's, which was neither created nor fostered with subsidy. The operator of such a domestic service is entitled by virtue of Section 805 (a) to complain of new competition made possible by subsidy, which is paid for operations in the foreign trade in competition with foreign lines. Matson has operated its exclusively domestic, unsubsidized, Hawaii service for three-quarters of a century. PFEL, on the other hand, first sought permission to enter the Hawaii trade long after it commenced business as a subsidized operator in the foreign trade.

The question whether Matson is a "monopoly" is not important under Section 805 (a). That section is not a vehicle for the fostering of competition for its own sake. Its purpose is to protect the domestic operator from the operator who is created, or supported, through the Government's subsidy. In any event, any carrier is unrestrictedly free to enter the Pacific Coast/Hawaii trade in competition with Matson so long as it is not affiliated with a subsidized line. But when the proposed entry is to be accomplished by a *subsidized* carrier, the Board is bound by Section 805 (a) to withhold its permission if the domestic carrier's service is adequate. Were Matson's service inadequate and additional service required, then the public

⁹ The Board has consistently adhered to the principle "that a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry, and to which they are [as opposed to subsidized operators] fundamentally entitled." (Bd. Rept. 18). See *Amer. Pres. Lines, Ltd.—Subsidy, Route 17*, 4 F. M. B. 488, 504 (1954); *Amer. Pres. Lines, Ltd.—Sec. 805 (a) Application*, 4 F. M. B. 436, 440 (1954); *Amer. Pres. Lines, Ltd.—Unsubsidized Operations, Route 17*, 3 F. M. B. 457, 470 (1951).

convenience and necessity would call for the additional service and the Act would no longer accord Matson protection from the competition of subsidized lines.¹⁰

The Department's narrow interpretation of "unfair competition" is no doubt due to the fact that it has neither special competence in the field of ocean shipping, nor a long experience with the Merchant Marine Act, 1936. That Act, and the Shipping Act, 1916, and not the anti-trust laws, must guide the Board in making its determination under Section 805 (a). *F. C. C. v. R. C. A. Communications, Inc.*, 346 U. S. 86, 93 (1953). The Board's interpretation of Section 805 (a) is framed against a background of close acquaintance with ocean shipping, including two decades of administration of the 1936 Act. It is responsive to the known needs of maritime commerce, and should not be overturned, unless it is clearly in violation of the Merchant Marine Act, or it has no basis in reason.

II.

The Board's report adequately supports its finding of prejudice to the objects and policy of the Act

The Department correctly states that "under Section 805 (a), the Board's finding that granting petitioner's application would also be prejudicial to the objects and policy of the Act constitutes an alternative independent basis for denial of the application", and that "the Board has broad discretion to de-

¹⁰ Apart from the Board's findings that Matson is "fundamentally entitled" to the traffic if it can adequately serve the trade and that it is in fact adequately serving the trade, the Board made other findings which support the conclusion that Matson would suffer "unfair competition" in a broader sense:

"It is apparent from the record that PFEL would be in a position to concentrate primarily on high-value commodities, and would in effect 'skim the cream' in this trade. PFEL would, in addition, provide direct service to Honolulu only, and service to Hawaiian outports would be provided by transshipment, or by direct call, only if sufficient cargoes offer. In contrast, Matson [is] the primary and historic carrier in this trade, and must continue to provide the necessary, and more costly, direct service to the Hawaiian outports, regardless of the volume of cargoes carried. We therefore feel that although the PFEL competition may divert less than 10 percent of the tonnage in this trade, the diversion of Matson revenues may be substantially greater. Such diversion of cargoes which otherwise have been moving by Matson would sharply reduce the voyage net proceeds of Matson's sailings in this trade" (Bd. Rept. 17).

termine whether grant of a Section 805 (a) application would be prejudicial to the objects and policy of the Act". However, the Department then says the Board did not "adequately set forth the reasons for its conclusion that permitting petitioner to operate in the Pacific Coast-Hawaii trade would have that effect. The Board has not explained what objects and policy would be prejudiced, or in what respects" (D. J. brief, pp. 14-15).

The Board had no reason to make separate findings of fact in support of its conclusions of "unfair competition" and "prejudice to the objects and policy of the Act", because many of its findings support both conclusions. Obviously, it would be a pointless task in these circumstances to catalogue separately the findings which support each conclusion, and there is no such legal requirement. The legal requirement, amply met in this case, is that "the report, read as a whole, sufficiently expresses the conclusion of the [agency] based upon supporting data * * *", thereby enabling the courts to perform the limited review function which is theirs. *Alabama Great Southern R. Co. v. United States*, 340 U. S. 216, 228 (1951); *Eastern-Central Ass'n v. United States*, 321 U. S. 194, 212 (1944); *United States v. Louisiana*, 290 U. S. 70, 80 (1933).

"Prejudice to the objects and policy of [the] Act" is obviously a broad standard which contemplates the weighing by the Board of the benefit as opposed to the detriment found to result from the granting of Section 805 (a) permission. It is apparent from the Board's report that it found prejudice to the objects and policy to the Act for two principal reasons: (1) The existing Pacific Coast/Hawaii service is adequate, and would be materially harmed by a new service, and (2) PFEL's competitive impact would jeopardize the vessel replacement program of Matson, operator of the existing service.

1. There can be no question that adequacy of service is an essential inquiry in the application of the "objects and policy" test laid down in Section 805 (a). This is true for two reasons. First, it is the express policy of the Act, specifically declared in Sec. 101 (46 U. S. C. 1101), that—

It is necessary for the national defense and development of its foreign and domestic commerce that the United

States shall have a merchant marine (a) sufficient to carry its domestic waterborne commerce * * *.

The second reason is that the "objects and policy" test necessarily includes consideration of the "public interest and convenience",¹¹ and "public interest and convenience" necessarily includes consideration of adequacy of service.¹²

The Board's finding of "prejudice to the objects and policy of the Act" is, therefore, supported by its finding of adequacy of service.¹³

2. With respect to the effect of PFEL's proposal on the replacement of Matson's vessels, the facts of record required the Board to conclude that the grant of permission to PFEL in this case would jeopardize Matson's ability to replace its vessels and hence its ability to maintain its service (see the Board's principal brief, pp. 42-43). The Island Territory of Hawaii is dependent upon suitable steamship service, and it is chiefly Matson that provides, and for decades has provided,

¹¹ In *Pacific Far East Line—Section 805 (a) Application*, 4 F. M. B. 580, 590 (1955), the Board held that "matters affecting public interest and convenience are necessarily to be considered in the light of the purposes and policy of the Act."

Congress employed the two tests almost interchangeably within Section 805 (a) itself. The "grandfather rights" proviso of the section stipulates that in a case where the applicant is found to have grandfather rights, "the Commission shall grant * * * permission without requiring further proof that the public interest and convenience will be served by such operation * * *."

¹² The I. C. C. defines the public convenience and necessity as follows:

"The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." *Pan-American Bus Lines*, 1 M. C. C. 190, 203 (1936).

There is little doubt that "public interest and convenience" has the same meaning as "public convenience and necessity".

¹³ While the Department denies that the standard of public convenience and necessity is properly applicable (D. J. brief, p. 13), it does not contend that, if applicable, the standard was incorrectly applied. It is, on the contrary, clear that it was correctly applied. With adequate service being furnished by the existing domestic carrier, there is no public interest or convenience to be served by introducing a new service which will divert needed traffic from the already adequate service.

this service. It is also true that the shipbuilding industry of the United States would be benefited by the replacement of Matson's vessels with new and modern ships, as would the commercial and defense value of the American-flag fleet as a whole. These factors had to be and were properly considered by the Board in determining whether the objects and policy of the Act would be prejudiced by a grant of Section 805 (a) permission in this case.¹⁴

Matson's predominant position in the Hawaii trade—its "monopoly", as the Department calls it—is of no significance in applying Section 805 (a) and cannot be used to undermine the relevant considerations underlying the Board's determination. Section 805 (a), is itself in derogation, rather than in furtherance, of competition as between a subsidized and a domestic carrier. PFEL, the subsidized applicant, has failed to show that a grant of Section 805 (a) permission would, nevertheless, benefit the objects and policy of the Act.¹⁵ It

¹⁴ Under the Board's interpretation Section 805 (a) presents a meaningful and integrated set of standards for the protection of interveners, who may include, under the terms of the section, "every person, firm, or corporation having any interest" in the application.

Those interveners qualifying as exclusively domestic services are automatically protected under the "unfair competition" standard if the trade is adequately served or if some other form of "unfair competition" is demonstrated.

Those interveners who do not qualify as exclusively domestic services, however, are given no standing by Section 805 (a) to be protected from "unfair competition." Such interveners will be safeguarded from subsidized competition only where the Board, after weighing all relevant factors, including adequacy of service and the broader standard of "public convenience and interest", finds that grant of permission would be prejudicial to the objects and policy of the Act.

In the instant case, because Matson is an exclusively domestic operator, and because the trade is adequately served, the Board must deny permission to PFEL. But if Matson did not so qualify, the Board would still have to deny permission, since it found that the existing service is adequate, and that Matson's vessel replacement program would be jeopardized, and did not find that there were countervailing benefits to the objects and policy of the Act.

¹⁵ The Department completely misses the mark with its comment that nothing in the Act or its history suggests that "the preservation of monopoly" is included in the objects and policy of the Act (D. J. brief, p. 15). The issue here is the proper application of Section 805 (a) of the Act, which may indeed result in the "preservation of monopoly" for a domestic carrier if its proposed competition is a subsidized operator who cannot satisfy

is the applicant's burden under Section 805 (a) to make such a showing. *Pacific Far East Line—Application*, 4 F. M. B. 580, 590 (1955). Because Matson is furnishing adequate service and a substantial diversion of cargo would adversely affect Matson's operations, including its vessel replacement, and because no benefit to the objects and policy of the Act was apparent, the Board acted properly in denying PFEL's application for permission.

CONCLUSION

The Board and the Department agree that this Court does not have jurisdiction to entertain this proceeding and that it should be dismissed.

As to the issues on the merits of the case, the Department offers a construction of "unfair competition" which is unacceptable. It would, in effect, eliminate that standard from the statute. Under the Board's construction, however, "unfair competition" as used in Section 805 (a) is a vital and meaningful standard.

The Department further errs in contending that the case should be remanded so that the Board may reconsider and clarify its conclusion on "prejudice to the objects and policy of the Act". The Board's conclusion in this respect is well supported by the findings in the Board's report.

the limited exceptions provided for. Congress not only saw no evil in such a monopoly, it took steps to safeguard it against the inroads of subsidized operators. Furthermore, whatever may be said for a public policy favoring competition in other fields, its application in a regulated field of business has been greatly diluted by judicial decision. " * * * encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest." *F. C. C. v. R. C. A. Communications, Inc.*, 346 U. S. 86, 93 (1953). The I. C. C. has consistently held that even when service is provided by only a single carrier, there is no reason to admit a new carrier to the field merely to provide competitive service. See *Clarke v. United States*, 101 F. Supp. 587, 590 (D. C. D. C. 1951).

The Court should sustain the report of the Board, if the proceeding is not dismissed for want of jurisdiction.

Respectfully submitted.

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REPLY BRIEF FOR PETITIONER
PACIFIC FAR EAST LINE, INC.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 14,007 FILED MAR 10 1958

PACIFIC FAR EAST LINE, INC., *Petitioner,*

Joseph W. Stewart
CLERK

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD,
MARITIME ADMINISTRATION, and CLARENCE G. MORSE,
MARITIME ADMINISTRATOR, *Respondents,*

MATSON NAVIGATION COMPANY, *Intervener.*

Petition for Review of Order of the Federal Maritime Board
and Maritime Administration

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529 Tower Building
Washington 5, D. C.
March 10, 1958

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,007

PACIFIC FAR EAST LINE, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD,
MARITIME ADMINISTRATION, and CLARENCE G. MORSE,
MARITIME ADMINISTRATOR, *Respondents,*

MATSON NAVIGATION COMPANY, *Intervener.*

**Petition for Review of Order of the Federal Maritime Board
and Maritime Administration**

**REPLY BRIEF FOR PETITIONER
PACIFIC FAR EAST LINE, INC.**

Petitioner Pacific Far East Line, Inc. ("PFEL") herewith files its reply brief. To summarize the position of other parties, *respondent United States admits that the Federal Maritime Board and Maritime Administration¹ erred, and affirmatively urges that the order of which review is sought should be reversed*, but by addendum to its brief apparently takes the position that there is no forum in which PFEL can obtain relief. Respondents

¹ The term "Board" is herein used to designate both respondents Federal Maritime Board and Maritime Administration (and Clarence G. Morse, Maritime Administrator, who is also Chairman of the Board, *ex officio*), except in Part I-A-3 hereof where the distinction appears from the text.

Federal Maritime Board, Maritime Administration, and Clarence G. Morse, Maritime Administrator, and intervener Matson Navigation Company ("Matson"), oppose the petition for review on jurisdictional grounds and on the merits.

I. THIS COURT HAS JURISDICTION UNDER THE REVIEW ACT OF 1950

For a detailed statement of the Court's jurisdiction, PFEL incorporates its Answer to Respondents' and Intervener's Motions to Dismiss for Lack of Jurisdiction, printed for the Court's convenience as Appendix I hereto.

A. THE REVIEW ACT

Most of the Board's arguments, in which Matson concurs (Matson's brief, page 10), were first presented to the Court in support of the motions to dismiss, which were denied (albeit without prejudice to renewal). No matter how these arguments are rephrased, they cannot obscure the following points, which are of paramount importance.

1. Overall objectives of the Review Act. The Board's contentions would in large part frustrate the objectives of Congress in enacting the Review Act of 1950²—a fact which

² Congress intended by the Review Act of 1950 to simplify, expedite, and provide for a uniform review of agency orders; to avoid the necessity of making two records for decision (before the agency and the district court); to conserve judicial time and energies by providing for review by three judges "at the stage where it is useful, namely in the decision without consuming their time unnecessarily in the preceding phases of the case" [i.e., the "record-making" or "hearing" phrase]; and to provide for Supreme Court review by certiorari where the Court felt review was warranted and thereby to relieve it from the burden of hearing appeals as of right, as under the Urgent Deficiencies Act. Hearings before Subcommittee Nos. 3 and 4 of the Committee on the Judiciary, House of Representatives, on H. R. 1468, H. R. 1470, and H. R. 2271, 80th Congress, and before Subcommittee No. 2 on H. R. 2915 and H. R. 2916, 81st Congress ("Providing for the Review of Orders of Certain Agencies, etc."), page 90; House Report 2122, 81st Cong., 2d Sess. (1950).

Matson admits (page 10) that "if review is to be had there are manifest advantages to proceeding in a court of appeals."

the Board does not deny. See also Appendix I, *infra*, pages 17-18 as to the procedural confusion and incongruities that would result if the Board's position were adopted.

2. The intention of Congress. When the Review Act of 1950 was under consideration, the Maritime Commission representatives (its Chairman and Solicitor) repeatedly urged that Congress should include "all reviewable orders" of the Commission; and they proposed language which they represented would cover "all reviewable orders" of the agency.³ This language was adopted by Congress *verbatim*. This fact, considered in the light of the overall objectives of Congress, and the absence of evidence of any intention or reason to except any reviewable order from the Review Act, is convincing evidence of the overriding intention of the Congress to include "all reviewable orders" of the Maritime agencies within the scope of the Review Act of 1950.

The Board's argument in effect (pages 18, 20) is that the Commission's Chairman and Solicitor did not mean what they repeatedly stated. That argument is speculation.⁴

³ See Appendix I, *infra*, pages 6-9.

⁴ There is no evidence in the legislative history of the Review Act of 1950 to support the Board's statement (page 18) that all orders under the 1936 Act "were considered by the Chairman and Solicitor to be unreviewable". If they did, they were wrong. And whatever the Solicitor and Chairman may have *privately* believed, they both emphasized to the Congressional committee that the language they proposed would extend to "all reviewable orders", which was clearly the overriding intention of Congress. If the Maritime Commission witnesses had mental reservations as to orders under the 1936 Act, they did not communicate their reservations to Congress. *It is the manifest intention of Congress in 1950 to which the Court must look, not to what the Board in 1958 says that the Commission officials intended, but did not say, in 1950.*

If it is true, as the Board contends (Board's brief, page 18), that "at the time of the hearings [in 1950] there had never been a suit for judicial review of an order issued pursuant to the 1936 act", this does not mean review would not have been available, if sought. Indeed, the first time review was sought thereafter, it was obtained. *American President Lines, Ltd. v. Federal Maritime Board*, 112 F. Supp. 346 (D. C. 1953).

Apparently so great is the anxiety of the Board to avoid judicial scrutiny of its action that it is willing even to repudiate the express representations of its predecessor.

3. **The express language of the Review Act.** The brief of the Board, *i.e.*, the Board and Administration, states (pages 11, 13, 18) that "the 1916 Act was a purely regulatory statute at the time the Review Act of 1950 was passed",⁵ as was also the Intercoastal Shipping Act, 1933, and that Congress intended the Review Act to cover only determinations under such "purely regulatory" or "quasi-judicial" provisions.⁶

But, in 1949, at the time the Maritime Commission's Chairman and Solicitor testified, the Maritime Board and Administration had not yet been created; and as late as May 23, 1950, when H.R. 5487 (thereafter the Review Act of 1950) was reported by the House Judiciary Committee, it covered only orders of the Maritime Commission.⁷ However, under Reorganization Plan No. 21 of 1950, transmitted to Congress on March 13, 1950 and effective 60 days thereafter,⁸ all of what the Board terms as "purely regulatory" functions of the Maritime Commission under the 1916 and 1933 Acts, *i.e.*, those which the Board concedes are judicially reviewable, were transferred to the Board. The other functions of the Maritime Commission, including so-called "executive", "administrative", and "promotional" functions, which respondent agencies

⁵ This, the Board states, resulted from the prior repeal of the "limited promotional provisions" of the 1916 Act (page 13, note 7).

⁶ If it were necessary to categorize the order in question as "regulatory" or "promotional", it would most certainly fall in the former category in view of its provision for a quasi-judicial hearing and its very close kinship to public interest and convenience-type statutes in other traditional regulatory statutes. See Appendix I, pages 9-10.

⁷ House Report 2122 (81st Cong., 2d Sess. 1950), reprinted in U. S. Code and Congressional Service (1950), page 4303.

⁸ Pursuant to the Reorganization Act of 1949, approved June 20, 1949.

now say are non-reviewable, were transferred to the Maritime Administration—thereby necessitating conforming amendments to H. R. 5487. If the present contention of the Board and Administration were correct, i.e., that Congress intended the Review Act to cover only “purely regulatory” functions vested in the Board, it would have sufficed for Congress to have amended H. R. 5487 to add only orders of the Board. In fact, Congress amended sections 1 and 2 of H. R. 5487 to include “orders of the . . . Federal Maritime Board or the **Maritime Administration**”⁹; and it amended section 14 to provide that “actions to enjoin, set aside, or suspend orders of . . . the Federal Maritime Board and the **Maritime Administration** which are pending when this Act becomes effective . . . shall proceed to final disposition under the existing law.” The act so passed.

The express inclusion in the Review Act of orders of (and possible pending suits against) the **Maritime Administration**—a fact neither the Board nor Matson mentions—conclusively proves that Congress understood that orders of the Maritime Administration were judicially reviewable, that it intended *all reviewable orders* to be covered by the Review Act, and that it did **not** intend to limit that Act, as the Board says, to so-called “purely regulatory” orders under the 1916 and 1936 Acts. *Under the Board’s argument, the references in sections 1, 2, and 14 of the Review Act to orders of and suits against the Maritime Administration would be devoid of meaning.*

3

In view of the overall objectives of the Review Act, the repeated Maritime Commission testimony that the language it proposed and Congress adopted covered “all reviewable orders”, the absence of evidence in the legislative history or of reason to restrict the Review Act as the Board contends, and the fact that the Board’s contention would render meaningless an important part of the statute, the only

⁹ Emphasis is added throughout this brief.

reasonable conclusion is that it was the *overriding* intention of Congress to include therein “all reviewable orders” of the Maritime agencies under all of the various “shipping acts”, including the 1936 Act.¹⁰ “It is the duty of this court to give effect to the intent of Congress”, “sacrificing, if necessary, the literal meaning in order that the purpose may not fail”. *Ozawa v. United States*, 260 U. S. 178, 194 (1922). Thus, even if the meaning of the language employed in the Review Act appeared to be plainly contrary to PFEL’s contentions, which it is not, that “does not preclude consideration of persuasive evidence” in support of those contentions. *Boston Sand & G. Co. v. United States*, 278 U. S. 41, 48 (1928).

That the Review Act is not “plainly” contrary to PFEL’s contentions, is proved by the fact that in *Richfield Oil Corp. v. United States*, 207 F. 2d 864, 869, note 6a (9th Cir. 1953), three judges, *sua sponte*, and even without the benefit of analysis of the legislative history of the 1936 and 1950 Acts, raised the possibility that actions under the 1936 Act are reviewable under the Review Act of 1950.¹¹

In the perspective of the above, the Board’s and Matson’s other contentions as to the meaning and purpose of the Review Act require little additional comment. The Board argues (pages 11-12) that the 1936 Act is “neither the same nor part of the 1916 Act”, and hence an order denying an application under the 1936 Act is not “entered under authority of the Shipping Act, 1916, as amended . . . ” But it is the intention of Congress in 1950, not when it passed the Merchant Marine Act in 1936, to which the Court must look in interpreting the statutory words

¹⁰ The Review Act of 1950 was considered by the House and Senate Judiciary Committees, rather than the House Merchant Marine and Fisheries and Senate Commerce Committees, which normally deal with maritime legislation.

¹¹ The court decided the case on other grounds and expressly reserved this point.

"Shipping Act, 1916, as amended". The 1916 and 1936 Acts are so integrally related in objectives, subject matter, content, and terms as to justify, if not require, a holding that the 1936 Act was embraced within the language of "the Shipping Act, 1916, as amended", within the understanding of Congress in 1950 (Appendix I, pages 4-5).¹²

The Board also contends (pages 11-15) that the purpose of the 1916 Act is "regulatory" and that of the 1936 Act "promotional". No such distinction is made in the Review Act of 1950, which includes both "purely regulatory" orders of the Board and other orders of the Administration. The fact is that each of the two Acts, 1916 and 1936, are both regulatory and promotional in nature (Appendix I, pages 4-5, 18).¹³

The Board's argument (page 12) that under PFEL's contentions there would be "two different penalties for the same action", i.e., under section 806(b) of the 1936 Act and section 32 of the 1916 Act, is fallacious. Section 32 of the 1916 Act, by its express terms, does not apply "where a different penalty is provided", and section 806(b) of the 1936 Act was expressly limited to acts "declared in this Act [i.e., the 1936 Act] to constitute a misdemeanor" and therefore does not apply to actions previously declared to be misdemeanors. The Review Act of 1950 in no way affects these sections.

¹² The Board refers to the "distinct nomenclature" of the 1916 and 1936 Acts. But nomenclature employed in 1916 and 1936 is at best inconclusive, and cannot be permitted in any event to "thwart" the clear intent of Congress in the 1950 Act. Cf. *Black v. Magnolia Liquor Co.*, 355 U. S. —, 2 L. ed. (2d) 5, 8 (November 12, 1957). In fact, the terminology employed by Congress to designate the various shipping acts has not been consistent (Appendix I, *infra*, page 5, note 6).

¹³ The unreliability of such distinctions, for decisional purposes, is shown by a statement by four members of the Maritime Commission printed in hearings on Reorganization Plan No. 21 of 1950: "The Government today *regulates* transportation as a whole by *promoting* parts of it and *promotes* one carrier by *regulating* another". Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 265 (81st Cong., 2d Sess.) (May 8 and 9, 1950), page 62.

Section 807 of the 1936 Act, to which the Board also refers (page 11), is of no assistance in interpreting the Review Act of 1950, and indeed supports PFEL's contention that the 1916 and 1936 Acts are integrally related. Similarly with respect to section 806(d) of the 1936 Act, which provides penalties for violations of all orders of the Commission, regardless of the act to which it related.

At pages 12-13, the Board suggests that the fact that the Review Act of 1950 referred to the Intercoastal Shipping Act of 1933 and did not specifically mention the 1936 Act proves that "the draftsmen of the Review Act of 1950 acted with deliberation and meant exactly what they said". But as shown above, the "draftsmen" of the language in question were officials of the Maritime agency, who repeatedly represented that the language they proposed covered "all reviewable orders" of the Maritime agency; and the fact that the Review Act as passed contained a specific reference to the 1933 Act proves only that Congress relied upon the representations of officials of the responsible agency and did not tinker with the language it had been advised covered "all reviewable orders".

The extract from the legislative history of the Review Act, at pages 19-20 of the Board's brief, proves that the Commission was opposed to proposals which "might be construed to authorize review of actions which the shipping acts did not contemplate to be reviewable by the courts"—which begs the question as to whether the action subject of the instant petition is judicially reviewable.¹⁴ Contrary to the Board's statement (page 15), PFEL does not contend that all determinations under the 1936 Act are reviewable, or that the Review Act of 1950 made reviewable

¹⁴ The Board's contention at page 13 that Congress in 1950 had "compelling reasons" for omitting orders under the 1936 Act from the coverage of the Review Act of 1950, also begs the question of judicial reviewability. No such "compelling reasons" appear in the legislative history of the Review Act, and if, as PFEL believes the Court must find, the order in question is judicially reviewable, Congress had every reason for including it in the Review Act of 1950, and *no reason* for excluding it.

any action which had not previously been reviewable; it contends only that an order under section 805(a), such as here, was and is judicially reviewable and that such review is in the Court of Appeals.¹⁵

B. THE BOARD'S ORDER HERE IS REVIEWABLE¹⁶

PFEL's detailed argument as to reviewability is at pages 9-17 of Appendix I. Matson argues (pages 14-19) that the Board's order is not judicially reviewable because the 1936 Act "preclude[s] judicial review" and agency action under section 805(a) "is by law committed to agency discretion", under section 10, Administrative Procedure Act. The Board also argues (page 14) that its determination under section 805(a) is "fraught with discretion" (page 14). But:

1. PFEL does not seek review of the *wisdom* of the Board's action within the range of its discretion; it contends that the Board *abused* its discretion; and that it acted upon erroneous interpretations of law, in violation of the Administrative Procedure Act, and without substantial evidence in the record—all in excess of its authority. See *Harmon v. Brucker*, Nos. 80 and 141, — U. S. —, 26 LW 4166-4167 (March 3, 1958), where agency action was held to be judicially reviewable even though the statute there provided that the agency action was final.

2. No statute precludes judicial review or commits determinations under section 805(a) to the absolute discretion

¹⁵ The Board's comment (pages 14-15) that under PFEL's contention the Courts of Appeals would "in large measure take over the executive function" is nonsense.

It should also be noted that Matson and the Board have not replied to PFEL's contention that in any event orders under the 1936 Act are "entered under authority" of the 1916 Act, as the quoted language is used in the Review Act of 1950. Appendix I, pages 16-17.

¹⁶ The Board states that this issue "will be decided, as it should be, in the companion district court action . . ." (page 10). If the Court of Appeals has jurisdiction under the Review Act, it is absurd to suggest that it must first await action by the district court.

of the Board, either expressly, or by any reasonable implication.¹⁷

3. There is no general hearing provision in the 1936 Act. However, section 805(a) expressly guarantees a hearing to applicants thereunder, as well as to interveners, which hearing is quasi-judicial and subject to the Administrative Procedure Act. Since Congress has left no discretion in the agency as to whether to hold a hearing under section 805(a), or as to the type of hearing, it is highly unlikely that it intended to commit the resulting determinations solely to agency discretion.

By contrast, many sections of the 1936 Act are expressly committed to the agency's "discretion" (see sections 501(c), 507, 607(d), 607(e), 708; *cf.* also section 805(b)). The contrast of section 805(a) with sections 801-804, all in Title VIII of the 1936 Act, is particularly revealing. Sections 801-804 all contain "discretionary" language.¹⁸ None provides for a hearing. This may not mean actions under sections 801-804 are wholly free from review, but it clearly negates any contention that Congress intended to commit

¹⁷ Matson argues that the omission of any express provision for review in section 805(a) "has particular significance" in view of the express provision for review in sections 402 (suits in the Court of Claims arising from termination of ocean mail contracts under the Merchant Marine Act of 1928) and 902 (suits against the United States for "just compensation" for the "taking" of vessels, and suits in admiralty to enforce maritime liens) of the 1936 Act (page 16). But neither section (402 has long been inoperative) involved "review" of agency action as the term is used in the Review Act; and both involved unique and complicated situations in which Congress provided a specialized procedure at variance with the review procedures available by "the regular processes of law" to which Director Peacock referred (Appendix I, page 12). Matson also cites section 611 which, however, was not enacted until 1938. *Switchmen's Union v. Board*, 320 U. S. 297, which Matson mentions, is inapplicable. See Appendix I, page 16.

¹⁸ Section 801 provides for keeping of books and records "in such form and under such regulations as may be prescribed by the Commission". Section 802 determinations "shall be final". Section 803 provides for certain exemptions "upon such terms and conditions and for such specific period of time as the Commission deems necessary or appropriate to carry out the policy of this Act" for "good cause shown", and section 804 may be waived by the Commission "in its discretion".

section 805(a) determinations solely to the agency's discretion. Contrast also the express provision of section 608 in which the Commission "is hereby vested with exclusive jurisdiction" to make certain determinations thereunder.

4. Section 31 of the 1916 Act presupposed a right of review, even without specific statutory provision, and simply prescribed the same venue and procedure available with respect to Interstate Commerce Commission actions. Congress contemplated that the same right of review would be available under the 1936 Act, as shown by PFEL's statement of the legislative history of that Act¹⁹—to which Matson and the Board have not replied.

5. PFEL has shown above that Congress in 1950 also understood that orders of the type the Board states are "discretionary" would be reviewable to some extent; *e.g.*, if there is abuse of discretion or errors of law—otherwise it would not have referred to orders of the Maritime Administrator in the Review Act.

6. In *American President Lines, Ltd. v. Federal Maritime Board*, 112 F. Supp. 346 (D.C. 1953), it was held that even actions under section 601 ff. of the 1936 Act, relating to the award of subsidy, are subject to judicial review, to ascertain "whether the Board has acted illegally."²⁰

¹⁹ See pages 12-14 of Appendix I, *infra*. Director Peacock, of the United States Shipping Board Bureau, a principal witness, urged the "fullest exercise of discretion" for the new agency and stated that "cumbersome" proposals for review were unnecessary since, even without specific provision for review, "if there is any gross abuse of discretion by the authorities administering this subsidy, the regular processes of law would ordinarily afford a sufficient protection". The Committee Chairman similarly referred to "that good old American right of appeal."

²⁰ The statement by the Board (pages 18-19, note 13) and Matson (page 19) that the APL case was overruled by this Court in *Kansas City Power & Light Company v. McKay*, 96 U. S. App. D. C. 197, 225 F. 2d 924, *cert. den.* 350 U. S. 884, is misleading. The Kansas City case rejected the reasoning of the APL case on the question of "standing to sue" under section 10(a), Administrative Procedure Act; it did not overrule or even refer to the lower court holding on the separate question of judicial reviewability of orders under the 1936 Act.

7. The Board must determine under section 805(a) whether grant of the requested permission would result in (a) "unfair competition" or (b) "prejudice to the objects and policy of the Act". Section 805(a) was patterned upon Part II of the Interstate Commerce Act (49 U.S.C. §§ 1, *et seq.*) (relating to motor carriers) (see Appendix I, pages 9-10). As determinations under that Act (including Part III relating to the licensing of certain water carriers) are reviewable, so determinations under section 805(a) should also be reviewable, absent clear evidence of contrary Congressional intent.

The fact that a determination may reflect "policy" and "discretionary" considerations does not render it immune from review. The National Transportation Policy (49 U.S.C. preceding §§ 1, 301, 901, and 1001), which the Interstate Commerce Commission is enjoined to consider in administering all of the provisions of the Interstate Commerce Act, embraces fully as wide a range, and the same type, of "discretionary" considerations as those the Board must consider under section 805(a), including "promotion" of adequate, economical service, sound economic conditions, the prevention of "unfair or destructive competitive practices", and the development of a transportation system adequate to meet "the commerce of the United States" and "the national defense". On December 9, 1957, in the latest of many such cases, the Supreme Court, in *Schaffer Transportation Co. v. United States*, 355 U. S. —, 2 L. ed. (2d) 117, reversed an action of the ICC for error in applying the standards of the National Transportation Policy.²¹

²¹ The Court stated, at 2 L. ed. (2d), page 121, that the Commission's discretion "must be exercised in conformity with the declared policies of Congress", and that "... we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress". The dissenting judge added that "even in that class of cases where Congress has relied on the Commission's discretion in enforcing the most broadly expressed congressional policy . . . the orders in such cases also fall under judicial scrutiny" (2 L. ed. (2d), at page 125).

8. In section 214 of the 1936 Act, Congress withheld from the Maritime Commission the power to enforce its subpoenas, and provided that subpoenas may be enforced only upon application to a court—thereby providing a forum for review of the subpoenas (see section 5(c), Administrative Procedure Act). If section 805(a) determinations are not judicially reviewable, a party could obtain review of a Board subpoena issued in a proceeding under section 805(a), but not of the ultimate decision in the proceeding in which the subpoena was issued—an incongruous result.

9. At page 17, Matson refers to “cases precluding judicial review in situations involving Government payments, subsidies or bounties and benefits.” There is no such question here; if PFEL does not obtain the permission requested, it will not operate the service proposed. No Government payments hinge on the final decision and no monies or property of the United States are in any way involved. The cases Matson cites are not remotely applicable.

10. The incongruity of Matson’s position is demonstrated by (1) its argument that determinations under section 805(a) are judicially non-reviewable because they are committed solely to agency discretion, and (2) its compulsive footnote, page 20, contending in effect that the Board’s determination would have been reviewable if *adverse* to Matson but is not reviewable because it was *favorable* to Matson. Matson’s arguments lack even the grace of consistency.

C. MISCELLANEOUS MATTERS MATSON AND THE BOARD SEEK TO RAISE FOR THE FIRST TIME IN THEIR BRIEFS²²

1. **PFEL’s petition is timely.** Matson argues (pages 10-15) that the Board’s action of May 14, 1957 was not a final order²³ because at the time filed, there was a petition for

²² The issues herein discussed were not raised by the Board or Matson in the prehearing stipulation.

²³ At page 16, Matson (but not the Board) states, “section 805(a) contains no provision for the entering of any ‘order’ by the Board”, implying

reconsideration, etc., pending before the Board. (That petition was subsequently denied.) Section 10(c) of the Administrative Procedure Act (5 U.S.C.A. § 1009(c)) disposes of Matson's contention:

"Except as otherwise expressly required by statute, agency action otherwise final should be final for the purpose of this subsection *whether or not there has been presented or determined any application . . . for any form of reconsideration . . .*"

No statute requires "otherwise". The "finality" of the Board's action of May 14, 1957 is further confirmed by the Board's own Rules;²⁴ the only decision in point under the Review Act of 1950, *Northwest Marine Term. Ass'n v. Federal Maritime Board*, 218 F. 2d 815 (9th Cir. 1955) ("The 60 days commences when the Board's final order is handed down *and a subsequent petition for rehearing or reconsideration does not extend that time*"); and two cases under the Civil Aeronautics Act, *Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board*, 205 F. 2d 449 (9th Cir. 1953), and *United States Lines Co. v. Civil Aeronautics Board*, 165 F. 2d 849, 852 (2d Cir. 1948).²⁵

that there is therefore no "order" for the court to review. But see the concluding sentence of the majority report of May 10, 1957, "We therefore deny such application". Section 1(d) APA (5 U.S.C. § 1001(d)); and *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B. 555, 556 (1955).

²⁴ The Board's Rule 16(c) specifically provides that a petition for reconsideration does not operate as a stay of Board action; it also expressly recognizes that there may be a petition for reconsideration or further hearing "pending judicial review". Thus:

"No petition for reopening or allowance thereof, except by special order of the Board, shall operate as a stay of any rule or order entered by the Board, except that pending judicial review, and where it finds that justice so requires, the Board may postpone the effective date of any action taken by it."

²⁵ None of the agency cases cited by Matson in its support were under the Review Act of 1950, and all came within the exception to section 10(c), APA. The statute applicable to the FCC cases contemplates decisions by a division within the agency and expressly provides for a right of rehearing by the entire Commission. A party may enter the proceeding for the first time by

PFEL in fact applied, under the Board's Rule 16(c), for a stay of the Board's order, so that it would not be forced to seek court review prior to determination of its petition for reconsideration—and *Matson opposed that request*. The Board did not act upon PFEL's request until *after* the 60-day period provided by the Review Act had expired, and then denied that request. If PFEL had filed no petition for review until after the Board's order of July 30, denying its petition for reconsideration, etc., Matson would have argued, on the strength of section 10(c), APA, the *Northwest Terminals* and *Flower* cases, and the Board's Rule 16, *supra*, that PFEL's petition was untimely filed.

It is significant that in all of the agency review cases Matson cites in its support²⁶ the effect of the court's holding was to afford petitioners an opportunity for review. "Under modern procedural methods pleadings are not to be struck down for non-prejudicial deficiencies". *Albertson, supra*, at page 401. See also *Consolidated Flower*

petition for rehearing. In order to give meaning to the statutory rehearing procedure and to avoid "an absurd or unjust result", the statute was early construed to toll the time for review, pending action upon a petition for rehearing (*Saginaw Broadcasting Co. v. FCC*, 96 F. 2d 554 (D.C. Cir. 1938)), bringing review of FCC cases within the exception to section 10(c). *Albertson v. FCC*, 182 F. 2d 397 (D.C. Cir. 1950) (involving a "motion to reconsider" a petition for "rehearing"), was decided upon this construction, the validity of which the FCC conceded. This construction was confirmed by statutory amendment to section 405, Federal Communications Act, in 1952 (47 U.S.C. § 405), providing that the time for review would be computed "from the date upon which public notice is given disposing of all petitions for rehearing . . ." (Act of July 16, 1952, 66 Stat. 720). The remaining FCC cases cited by Matson were decided subsequent to the 1952 amendments. *State Airlines, Inc. v. C.A.B.*, Civ. No. 9604 (D.C. Cir., September 3, 1947, unreported), also falls within the exception to section 10(c), Administrative Procedure Act, since petitioner there sought to raise matters not previously urged before the agency, contrary to the provisions of section 1006(e), Civil Aeronautics Act (49 U.S.C. § 646(e)).

²⁶ *Safeway Stores, Inc. v. Coe*, 136 F. 2d 771 (D.C. Cir. 1943), also cited by Matson, was wholly dissimilar on the facts, did not involve agency review, and was governed by Rule 6(b) of the Federal Rules of Civil Procedure.

Shipments, Inc. v. Civil Aeronautics Board, supra, at page 452 (petition for review considered timely upon showing of good cause for delay in filing); and section 11 of the Review Act of 1950 and Rule 38(j) of this Court's Rules, indicating this Court's similar powers. Under section 9(a) of the Review Act, jurisdiction vested in this Court upon the filing of PFEL's petition for review, and there is no substance to Matson's argument.

2. **Standing.** The Board states that "The issue is whether, and to what extent, the Board should waive the subsidized operator's contractual undertaking to keep out of the domestic trade" (page 15). Matson asserts that PFEL "elected" the "restraints" of section 805(a), has suffered no "legal wrong", and has not been "adversely affected or aggrieved" (pages 15, 17, 19).

The pertinent portion of the PFEL's subsidy contract, to which opposing briefs refer, is not a part of the record. In fact, it only stated the law as it applies to PFEL, as Matson in effect concedes (pages 4, 15 and 20, note 5). PFEL "elected" no restraints; the contract imposed no restrictions not already imposed by section 805(a); and PFEL did not waive its right to review.²⁷ The issue before the Board was whether PFEL was entitled to written permission specified in the statute, not whether the Board should "waive" a contractual undertaking.

As to "legal wrong", prior to entering into its subsidy contract PFEL was "perfectly free" to enter the Hawaii trade, as Matson concedes (page 3). That right persists, even after entering into the subsidy contract, subject only to the necessity of obtaining section 805(a) permission, to which PFEL is entitled if its service would not result in "unfair competition" or "prejudice to the objects and

²⁷ Cf. Public Law 356, 83d Cong., 2d Sess. (approved May 11, 1954), invalidating undertakings in government contracts limiting the right of judicial review.

policy of the Act" under section 805(a).²⁸ If that permission is unlawfully withheld, PFEL has been denied a legal right and has suffered "legal wrong". Also, PFEL has a legal right to a hearing under section 805(a) and a determination supported by the record and in accordance with law. In any event, existence of "legal wrong" is not prerequisite to review under the Review Act of 1950.

The Board implicitly concedes PFEL is a "person aggrieved" (page 14), and Matson urges that an intervenor in a section 805(a) proceeding before the agency would be a "person aggrieved" (page 20, note 5). Since section 805(a) provides that the Board must grant a hearing not only to intervenors but also "to the applicant", there is no basis for any different result as to an applicant. If an unsuccessful applicant for permission is not a "person aggrieved", no one is.

PFEL next replies to contentions of the Board and Matson directed to the merits of the Board's action. One preliminary observation is required. It is not the function of judicial review to give to counsel for an agency and the party prevailing below an opportunity to rewrite an inadequate report, or to supply alternative grounds upon which the agency *might* have decided the case. Yet this is what the briefs of the Board and Matson have attempted to do. The issues before the Court must be decided in light of the findings actually entered by the Board—not what it is now said the Board might have found, but did not.

It is PFEL's position that the Board erred in a number of respects in finding that PFEL's Pacific Coast-Hawaii service would result in "unfair competition" within the meaning of the first clause of section 805(a), and that accordingly, the Board's action must be set aside. The

²⁸ The agency "may not impose a more burdensome requirement . . . than that imposed by law". *Pacific Power & Light Co. v. Federal Power Commission*, 111 F. 2d 1014, 1016 (9th Cir. 1940); *Anderson Motor Service v. United States*, 151 F. Supp. 577, 582 (E.D. Mo. 1957). Otherwise PFEL's statutory right to a hearing would be rendered nugatory.

Board (pages 21, 39-40) and Matson (page 28) argue that the Board's action should nevertheless be sustained upon the basis of its further finding (Report, page 19) that PFEL's service would result in "prejudice to objects and policy of the Act", under the second clause of section 805(a). This is an instance in which the briefs of the Board and Matson have sought to rewrite the Board's report.²⁹ The finding of "prejudice" was not separately considered in the Board's report; was stated only "in conclusory fashion in the statutory language" (*American Airlines v. Civil Aeronautics Board*, 235 F. 2d 845, 853 (D. C. Cir. 1956); and must stand or fall with the finding of "unfair competition", as shown by PFEL's brief, pages 45-46. Even if there were doubt as to this, the Board's findings are so inextricably interwoven and its report otherwise so inadequate that in no event could the Court assume the Board would have found "prejudice" absent its finding of "unfair competition". Accordingly, we turn to the issues involved in that finding.³⁰

II. MATSON IS NOT ENTITLED TO THE PROTECTION OF AN "EXCLUSIVELY" DOMESTIC OPERATOR

The Board held that because of its California/Hawaii operations Matson is entitled to the special protection

²⁹ The Board's brief carries this to the extreme of discussing the "vessel replacement" issue under the "prejudice" finding and not under "unfair competition". As to this, see PFEL's opening brief, pages 32-33, 45-46; and the instant brief, *infra*.

³⁰ As to the Board's error in failing to attach due weight to the Examiner's findings, to adequately state its findings and conclusions, or to consider and rule upon material issues, PFEL relies upon its opening brief, pages 9-23. Similarly, with respect to PFEL's contention, pages 46-47, that the Board's action discriminated against it. As to the latter point, Board counsel (their brief, page 53) offer several justifications for that discrimination. It suffices to reply that the Board itself did not make any such explanation. Under *Greensboro High-Point Air. A. v. Civil Aeronautics Bd.*, 231 F. 2d 517 (D.C. Cir. 1956), PFEL is entitled to an explanation by the Board in its report, not by Board counsel on brief.

against "unfair competition" in the first clause of section 805(a), which is confined to persons "operating exclusively in the coastwise or intercoastal service". The Board urges that the language "operating exclusively" in the domestic service applies either to all the operations of the person in question, or to the particular service in question, notwithstanding that such operator may have other services. It states that in its prior decisions it has rejected the former more literal construction (for which no party in this proceeding has contended), and has instead "read the statute realistically and followed the latter construction" (Board's brief, pages 23-24).

The avowed desire to "read the statute realistically" is commendable—but in this case the Board's construction is wholly unrealistic, because the undisputed fact is that *Matson itself wholly owns, manages, and operates a subsidized service in the foreign commerce of the United States* (PFEL's brief, pages 24-25). Congress, the Maritime Commission, and the Board itself on previous occasions have distinguished between *subsidized* companies (or groups of companies) which also have interests in the domestic trade, on one hand, and "persons operating exclusively in the coastwise or intercoastal service" on the other (see PFEL's brief, pages 23-29). This distinction is manifest in the basic structure of section 805(a), since only carriers in the former group are required to obtain the Board's permission for domestic operations; and it was paramount in the mind of Congress when it confined the protection of the first clause of section 805(a) to persons "operating exclusively" in the domestic trade. Congress intended that the special protection of section 805(a) for "exclusively" domestic operators should be employed *against*, not in favor of, subsidized operators such as Matson. It is thoroughly *unrealistic* for the Board now to hold that Congress intended to include a carrier with both

subsidized foreign and domestic operations as a beneficiary of the special protection of section 805(a).³¹

The cases upon which the Board and Matson rely afford no precedent, since, unlike Matson, none of the operators there protected operated any *subsidized* service in the foreign trade or had any affiliation whatever with any other carrier holding a subsidy contract. At page 25, the Board states that PFEL "would strip almost every domestic service of the protection now afforded it by the Board". This is a misstatement. **Matson is the sole beneficiary of the Board's unprecedented perversion of section 805(a).**

Even under the Board's theory of section 805(a), Matson's California/Hawaii operations are not "exclusively" domestic, because Matson also operates the subsidized vessels of Oceanic in domestic California/Hawaii trade, which vessels, of course, also operate in foreign trade—a fact which the Board has not mentioned in this connection.³² See PFEL's brief, page 29.

³¹ Matson asserts "grandfather" rights under section 805(a), but the grandfather clause of section 805(a) obviously pertains only to grant of the requisite permission, and not to protection as an "exclusively" domestic operator.

Matson's claim, page 43, that PFEL in effect contends that "when in any trade grandfather rights are recognized for any carrier, they must be granted to all", is illogical and untrue.

³² Matson states (its brief, page 28, note 7):

"It is true that Oceanic . . . also has permission to service Hawaii in domestic commerce. In fact, no Oceanic cargo vessels *had* called at Hawaii in domestic commerce for several years (Tr. 2440-42, 2656) . . ."

But Matson thus refers only to Oceanic's "cargo vessels"—not to Oceanic's "combination cargo-passenger ships"—and states only that those vessels "had" not called at Hawaii in domestic commerce for several years (presumably as of the close of hearings). In fact, on February 2, 1956, after the last day of hearings, the Board advised Oceanic that it had on January 25, 1956 granted permission for Oceanic's "combination cargo-passenger ships" to operate in the domestic Hawaiian trade, and had "authorize[d] the continuance" of permission for Oceanic's subsidized "cargo vessels" to carry domestic Hawaii cargo (see PFEL's brief, pages 29, 54-55). The Board's brief, page 52, note 57, states, "Oceanic operates in the Hawaii trade . . ." and that it has continuously so operated "since long prior to the 1936 Act".

At page 24, the Board's brief (but not its report) states that the Board "regards the protection of section 805(a) to be necessary for the survival of those services which, without touching any foreign port, are sustained wholly by domestic cargo."³³ But, PFEL's service itself would be "sustained wholly by domestic cargo", since trade with Guam, its other area of call, is "domestic" commerce.

III. PFEL'S COMPETITION WOULD NOT BE "UNFAIR" TO MATSON

A. THERE IS NO FINDING PFEL WOULD HAVE A COMPETITIVE OR OTHER ADVANTAGE OVER MATSON

Whether or not Matson technically is an "exclusively" domestic operator as to its California/Hawaii operation, PFEL's competition would not be "unfair" under section 805(a), because PFEL, as the holder of a subsidy contract for its entirely separate Trade Route 29 service, would have no competitive or other advantage in the Hawaii trade which Matson does not have from its ownership and operation of Oceanic; and in fact, as the Examiner found (and Matson, pages 27-28, but not the Board, page 39, implicitly concedes), Matson would have the advantage over PFEL. See PFEL's brief, pages 30-32.

Neither the Board nor Matson attempts any direct reply to PFEL's argument. However, the Board's brief implies (page 39) and Matson's brief states (page 41) that "it is a fair appraisal" that PFEL's subsidized operations "would support" its domestic Hawaii operations. Matson also states (page 28) that PFEL's subsidy "enables PFEL to enter its bid for the available cargo". If it is meant thereby to imply that the Board made any such finding, the implication is valid only as a measure of the desperation with which Board counsel and Matson seek to defend

³³ As to the Board's lack of authority, in the name of "policy", to extend the special protection of the first clause of section 805(a) beyond the terms of the statute, see *American Overseas Airlines v. CAB*, No. 12579 (D.C. Cir.) January 23, 1958.

the Board's report.³⁴ If the Board had thought it could support such a finding, it most assuredly would have referred thereto in its report. But the Board did not find that PFEL's subsidy would "support" its Hawaii service,³⁵ and the Examiner emphatically found to the contrary, after discussing the matter in detail. The Examiner correctly found that Matson's witness admitted the fact PFEL received a subsidy in its wholly separate transpacific service which would not permit PFEL to obtain additional cargo in competition with Matson, and Matson did not except thereto. See PFEL's brief, pages 30-32.³⁶

B. "ADEQUACY" IS NOT THE ISSUE BEFORE THE COURT

The Board's brief (especially pages 31-37) defends the finding of "unfair competition" with a discussion of "adequacy" of service in the Pacific Coast/Hawaii trade, and the assertion that Matson is "fundamentally entitled" to perpetuation of its monopoly. PFEL believes the Exami-

³⁴ Also in this category is Matson's statement (page 42) that the Board found that the Examiner's finding that "PFEL receives no benefit as a subsidized line that is not available to Matson through Oceanic" is "completely without support in the record". The Board made no such finding. As to record support for the Examiner's finding, see Tr. 1368, 1372, 1378, 1379, 1382, 1389, 1393-94, 1398, 1410-13, 2233-34, 2725-33, 2742, and PFEL's brief to the Board, pages 24-26, paragraphs 22 and 23.

³⁵ Comparisons by Matson (page 27) and the Board (page 38) of the relative size of PFEL's proposed domestic service and its subsidized foreign service, with the domestic and subsidized foreign operations of Matson, in the total absence of any finding of a resultant advantage to PFEL over Matson in the Hawaii trade, are misleading and irrelevant under section 805(a). See PFEL's petition for reconsideration, pages 9-10, Part II-C; and Reply to Exceptions, pages 10-11.

³⁶ In order to put the matter in perspective, Exhibit 25, pages 8-9, shows that from 1950 through April 30, 1955, PFEL earned slightly over \$200,000,000 in voyage revenue; by comparison its estimated net subsidy was no more than two percent of that figure. Matson's consolidated balance sheet (Exhibit 90) shows voyage revenues of approximately \$280,000,000 and additional income (hotels, investments, office building, shipyard and miscellaneous) of over \$35,000,000, from 1950 through 1954.

ner's contrary findings were correct,³⁷ but the important point is that the Board did *not* deny PFEL's application on the ground that Matson's service was "adequate". *The cornerstone of its decision was its conclusion that the "diversion of the volume of cargo which PFEL would carry would seriously jeopardize" Matson's "vessel replacement program"* (Report, pages 17, 18).³⁸

At page 37, the Board's brief implies that the Board's finding that PFEL would "in effect 'skim the cream' in

³⁷ PFEL does not ask the Court to read (if the Board read) the 7500 pages of testimony of the numerous shipper, public, and other witnesses, or the 1900 pages of exhibits in the record, to decide whether Matson vessels have adequate physical capacity, or its service is otherwise "adequate". For the detailed reasons shown at pages 9-18 of PFEL's brief, PFEL submits the Board's finding as to "adequacy" was in error. Contrary to the Board's argument, the voluminous record presented issues both as to credibility and the weight to be assessed to conflicting evidence. An outstanding example is Matson's so-called "vessel utilization" data, which the Examiner found to be inaccurate in important respects, which PFEL contended were unreliable and inaccurate in further respects, but which the Board relied upon without question and without discussing the Examiner's findings or PFEL's contentions. See PFEL's brief to this Court, pages 16-17, and brief to the agency, pages 3-5. A summary of public and shipper testimony supporting PFEL's application and of specific deficiencies in Matson's service was set forth at pages 12-20 of PFEL's brief to the agency.

³⁸ This Matson admits at page 29 in its statement that "... if [the domestic] carrier does not *need* all of the available cargo in order to maintain its operation on a satisfactory basis, it perhaps cannot be heard to object" [i.e., the mere fact existing service may be "adequate" is no grounds for objection, unless it is also shown such carriers "need" the cargo], and its further statement at page 34 that the Board's "ultimate finding" on the question of Matson's "need" for the available cargo "was that 'the diversion of the volume of cargo PFEL would carry would seriously jeopardize Matson's vessel replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service.'"

Matson (but not the Board) suggests that the language "would impede the proper development and continuation of Matson's California/Hawaii service", constitutes an independent basis of the Board's decision, unrelated to the alleged "serious jeopardy" to Matson's "vessel replacement program" (Matson's brief, page 39). However, it is clear from the majority report that the statement that PFEL "would impede" Matson's California/Hawaii service was *based upon*, not independent of, the finding as to "jeopardy" to Matson's "vessel replacement program". See also the dissenting opinion, page 22. And even if it were not clear, that fact alone would require the Court to remand the proceeding to the Board. Matson grasps at straws.

this trade," and would serve Hawaiian outports by transshipment from Honolulu, is still another independent basis upon which the Board's report should be sustained. The Board does not attempt to answer PFEL's contentions as to such findings (PFEL's brief, pages 43-45); but again the important fact is that those findings were only preliminary to the ultimate finding of "serious jeopardy" to Matson's "vessel replacement program", and not an independent basis of the Board's action.³⁹

As to the finding that Matson is "fundamentally entitled" to all the available cargo, the Board wholly disregarded the facts that Matson (1) is a *subsidized* operator, and hence in relatively the same position as PFEL insofar as "entitlement" to the special protection under section 805(a) is concerned, (2) is a monopolist, and (3) is itself operating without the requisite permission under section 805(a).⁴⁰ See PFEL's brief, pages 18-23.

³⁹ At page 36, note 9, Matson states, "PFEL attacks the Board's 'skim the cream' reference, pointing out that the Examiner failed to make such a finding" (Brief, page 17). At page 17 of its brief, PFEL in fact pointed out not that the Examiner *failed* to make such a finding, but that he makes an *express finding to the contrary*. See also PFEL's brief, pages 43-45, demonstrating the Board's error—to which Matson's only reply (page 36, note 9) is that the Board's finding "seems right, on the grounds it gave".

⁴⁰ The Board's brief, at page 51, note 56, states (without citation or record reference) that the Examiner's finding that "Matson's operations in the domestic service between the mainland of the United States and Hawaii is covered by section 805(a) permission" is "manifestly correct". This is the statement of Board counsel, not of the Board itself, whose *refusal* to make a determination on this issue is one of the grounds for PFEL's petition for review. See PFEL's opening brief to the Court, page 19, and Appendix V, which show that the Board as recently as January 25, 1956, cautioned that Matson's "grandfather" permission "is not to be construed as expanding or enlarging" upon the permission originally granted in 1937. That the Examiner's finding was *incorrect*, see PFEL's exceptions to the Examiner's Recommended Decision, pages 2-4, Exception 1.

IV. THE FINDING THAT PFEL WOULD "SERIOUSLY JEOPARDIZE" MATSON'S "VESSEL REPLACEMENT PROGRAM" WAS IN ERROR

The Board found that Matson's "vessel replacement program will require an investment of at least 100 million dollars" and that the "diversion of the volume of cargo which PFEL would carry would seriously jeopardize" that program (Report, pages 17, 18). PFEL contends (its brief to the Court, pages 32-40) that (1) Matson has no vessel replacement program; (2) there is a total absence of evidence to support the finding that any such program would require "an investment of at least 100 million dollars"; (3) there is no evidence PFEL "would seriously jeopardize" any such program; and (4) the overwhelming fact is that PFEL's competition would be a relatively insignificant factor, compared to the tremendous problems involved in replacing Matson's fleet.

A. MATSON HAS NO VESSEL REPLACEMENT PROGRAM

In reply to point (1) above, the Board states Matson has a "program" for "studying" the situation and that "the incontrovertible and material fact is that replacement will inevitably become necessary". But a program for "studying" is not a program for replacing vessels, however "necessary" or inevitable replacement may be. The record proves from Matson's own testimony that it has no present program for replacement, and no present idea of what the service requirements of the trade will be when it comes time to replace its present fleet, or what type of vessel, propulsion, or cargo handling methods it will employ in the future (PFEL's brief, pages 33-34). Matson's brief does not contend otherwise.

B. THE RECORD WILL NOT SUPPORT A FINDING AS TO THE COST OF SUCH A PROGRAM

As to point (2), i.e., the cost of vessel replacement, the Board and Matson both refer to testimony of Matson's Comptroller (Tr. 2783-2785). However, that testimony was

qualified as "an estimate which I have carried in my mind, I confess not knowing where I have seen it" (Tr. 2783); and referred only to replacement of Matson's *existing* fleet with "the same type ships [Matson is] now operating" (Tr. 2785)—which is immaterial since other testimony by Matson proves that if it ever seeks to replace its present vessels, it will not be with the same type ships Matson now operates, and since Matson's Comptroller also testified it is presently impossible to "forecast . . . what future prices may be" (Tr. 2781). The question is not whether the 100 million dollar figure can be "successfully contradicted" as Matson says (page 40), but whether there is substantial support therefor in the record. There is not.

C. THERE IS NO EVIDENCE PFEL WOULD "SERIOUSLY JEOPARDIZE" REPLACEMENT OF MATSON'S VESSELS

As to point (3), the Board's brief states (page 42) that "since PFEL's proposed operation would materially divert traffic and hence earnings from Matson, it would in consequence 'jeopardize', *i.e.*,—imperil—Matson's ability to replace its vessels". However, aside from the fact that the Board's finding as to the extent PFEL would "divert" traffic and earnings is erroneous (see PFEL's brief, pages 41-45), loss of traffic and earnings would not be equivalent to "jeopardy", much less "serious jeopardy", to Matson's vessel replacement program, even if it had one, which it has not.

D. PFEL'S COMPETITION WOULD BE ONLY A RELATIVELY INSIGNIFICANT FACTOR

As to point (4), neither Matson nor the Board even attempts to answer PFEL's contention that its competition would in any event be only a relatively insignificant factor compared to the tremendous problems involved in replacing Matson's fleet. Matson's brief, page 40, ignoring the previous statements of its witnesses and counsel (see

PFEL's opening brief, pages 37-40),⁴¹ states only that PFEL's argument is a "surprising twist". The tremendous problems of vessel replacement facing Matson and other domestic operators are no "surprise" to Matson or to the Chairman of the Board and Administrator, who, on November 19, 1957, stated as follows:

"We are in *poor position for replacement of the tramps and domestic carriers . . .* The replacement of 140 non-subsidized liner vessels is doubtful—unless operating subsidy is made available to them. In the other groups of ships, bulk carriers, tramps, *vessels for the domestic trades* and special purpose ships, **we see little or no chance of large scale replacement.**"⁴²

In the face of this undeniable fact, the Board's finding of May 14, 1957 that PFEL would "seriously jeopardize" Matson's "vessel replacement program" is all the more inexplicable. The quoted statement proves that the attempt by Matson and the Board to invoke that much over-worked *apologia* for findings for which there is no record support; *i.e.*, agency "expertise", can be to no avail.

As a premise for the Board's finding of "serious jeopardy", etc., the Board's brief states (page 42), "The Matson vessels, built between 1943 and 1945, will require replacement **during 1963-1965**". But Matson's brief to this Court, page 40, note 12, admits that "The figures in

⁴¹ At the hearing Matson actually resisted the production of information PFEL sought to show the extent to which private arrangements between Matson and its stockholder agents resulted in siphoning off profits otherwise available for vessel replacement (Tr. 2823-27). Matson's counsel stated, "We do not say that PFE and PFE alone is the straw that breaks the camel's back in the replacement problem. There are many factors . . ." He then continued, "I suggest that we proceed with the cross-examination of this witness and get to *more material matters*" (Tr. 2826-27)—which is ironic in view of the fact that vessel replacement was the issue upon which the Board thereafter decided the case.

⁴² Statement by Honorable Clarence G. Morse, Chairman, Federal Maritime Board and Maritime Administrator, U. S. Department of Commerce, at the Water Industry Forum of the 12th Annual Convention of the National Defense Transportation Association, November 19, 1957, entitled "Research and Development Affecting The Ship Replacement Program", (Printed) Release No. SP-57-24.

evidence supports Matson's estimate that it would take 46.4 years to accumulate sufficient earnings to replace its fleet", i.e. at least until 1990, even "assuming denial of PFEL's application and continued earnings at the 1950-1954 level". *Matson itself thus renders the coup de grace to the Board's finding that PFEL would "seriously jeopardize" Matson's vessel replacement program.*

E. ERROR IN THE FINDINGS AS TO THE EXTENT PFEL WOULD "DIVERT" CARGO FROM MATSON

The Board also erred in its assumption as to the extent of cargo and revenue PFEL would "divert" from Matson. See PFEL's brief, pages 41-45. Matson's complaint (its brief, page 37) that PFEL has "gone outside" the record is unjustified. At pages 41-43 of its brief, PFEL showed that at the time the Board found PFEL would divert ten percent or "nearly 10 percent" of Matson's cargo, solely on the basis of 1950-1954 traffic levels, there was undisputed evidence of record proving rising traffic trends through 1954, still further increases in the first half of 1955, and Matson's admission that 1955 overall was a "fat year". In addition, at the oral argument, Public Counsel called to the Board's attention data of which the Board should have taken official notice (from Matson's annual reports to the Board) that traffic for 1955 and 1956 and increased 18 and 26 percent respectively over 1954. These figures were confirmed by the findings of a Board Examiner in another proceeding (in which Matson was the principal respondent) on June 25, 1957, prior to denial of PFEL's petition for reconsideration, etc., and in turn by the Board in that proceeding on December 12, 1957.⁴³ Matson does not challenge their accuracy.

Following oral argument to the Board, PFEL requested the Board either take official notice of the traffic moving in the Hawaii trade subsequent to the date of record or to

⁴³ Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increase in Rates, FMB Docket No. 808, Report served December 12, 1957, page 7.

hold a further hearing, and renewed the matter by its petition for reconsideration, etc., following the Board's decision of May 14, 1957. The Board unquestionably had the power, and, PFEL believes, the obligation, to take official notice of the data in question, particularly since they were contained in Matson's own reports to the Board.⁴⁴ Its refusal to do so, or to reopen the record for a further hearing, and, in the face thereof, its finding on the basis of 1950-1954 data that PFEL would divert 10 percent or nearly ten percent of Matson's cargo, were arbitrary in the extreme.⁴⁵ See *Trunkline Gas Company v. Federal Power Commission*, 247 F. 2d 159, 165 (5th Cir. 1957), wherein the FPC was held to have erred in acting "without regard to the obvious fact that the so-called test period of 1955-1956-1957 is, and was known to be, completely unrealistic for 1957-1958 to 1960 and beyond . . ."

CONCLUSION

The action of the majority of the Board was contrary to law, the facts of record, the detailed findings and recommendations of its hearing examiner and its staff, including Public Counsel; it was entered over the dissent of its Vice Chairman, and has been repudiated by respondent United States. It moreover, assumed a level of traffic which the

⁴⁴ See the decision of this Court in *State of Wisconsin v. Federal Power Commission*, 91 App. D. C. 307, 201 F. 2d 183, 186 (D.C. Cir. 1952), *cert. den.* 345 U. S. 924. See also *Market Street R. Co. v. Railroad Com. of Cal.*, 324 U. S. 548, 561-562 (1945); *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S.D.N.Y. 1951); *Spearfish Suspension Case* (CAB No. 6200), 4 Pike & Fischer Ad. Law (2d) 323 (1954); *Wilmot Gas & Oil Co. v. United Gas Pipe Line Co.* (FPC No. 252), 3 Pike & Fischer Ad. Law (2d) 617, 620 (1953); *Latin America Air Freight Case* (CAB No. 2888, et al.), 2 Pike & Fischer Ad. Law (2d) 699, 700 (1952).

⁴⁵ Matson's statement (page 38) that it would be "unfair" to Matson to consider traffic subsequent to 1954 ignores the fact that the calculations in the Board's report of May 14, 1957 already assume that PFEL would carry the maximum possible amount of cargo in the space it expects to make available in the Hawaii trade (see Report, pages 6 and 16). Hence the substantial increase in traffic since 1954 can only be interpreted as offsetting any possible diversion of cargo and revenue from Matson.

Board knew had materially increased at the time its action was taken, and replacement of Matson's vessels by 1963-1965 when Matson itself says that they cannot be replaced before 1990. The defense of its action in the Board's brief is inconsistent, and presupposes facts of record which do not exist and findings which were not made. Notwithstanding that the Board has already denied PFEL's petition for reconsideration and rehearing, it states at the top of page 38 that "PFEL may renew its application should it believe that materially changed circumstances have eventuated to justify a different result", and at the bottom of page 38 dashes this prospect with the statement that "there would be little hope that the administrative process could ever be consummated" if "cases were to be reopened whenever some new circumstance or new trend is disclosed". The Board has advised this Court that it has no jurisdiction to grant relief, and that jurisdiction to review its action lies, if at all, with the district court; and it has told the district court that its action is not judicially reviewable. PFEL submits that this Court clearly has jurisdiction under the Review Act of 1950 and earnestly prays that it grant the relief requested.

Respectfully submitted,

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APPENDIX I
PETITIONER'S ANSWER TO RESPONDENTS' AND
INTERVENER'S MOTIONS TO DISMISS FOR
LACK OF JURISDICTION

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,007

PACIFIC FAR EAST LINE, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, ET AL., *Respondents.*

**Petition for Review of Order of the Federal Maritime Board
and Maritime Administration**

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**Petition for Review of Order of the Federal Maritime Board
and Maritime Administration**

**PETITIONER'S ANSWER TO RESPONDENTS' AND
INTERVENER'S MOTIONS TO DISMISS FOR
LACK OF JURISDICTION**

Petitioner Pacific Far East Line, Inc. ("PFEL") hereby opposes the motion of respondents Federal Maritime Board, Maritime Administration, and Clarence G. Morse, Maritime Administrator, concurred in by respondent United States of America, and the motion of intervener Matson Navigation Company ("Matson"), to dismiss the petition for review for lack of jurisdiction.¹

¹ Matson's motion to dismiss merely adopts the grounds urged in behalf of respondents' motion. PFEL's answer hereafter refers primarily to respondents' motion.

PRELIMINARY STATEMENT

The petition, filed under the Review Act of 1950,² seeks review of respondents' order denying PFEL's application for written permission under section 805(a), Merchant Marine Act, 1936 (46 U.S.C. §§ 1101 *et seq.*), to operate vessels carrying cargo between the Pacific Coast of the United States and Hawaii. Respondents' report and order (Exhibit 1 to the petition for review) were entered following a formal public hearing held pursuant to section 805(a), which is a "public convenience and necessity"-type statute applicable to domestic trade operations by carriers holding operating-differential subsidy contracts in the foreign trades. PFEL believes that the order is unquestionably a judicially reviewable order. However, because it has never been definitively determined whether jurisdiction is in the Court of Appeals under the Review Act of 1950 or in the district courts (see PFEL's petition, page 2, note 3), PFEL has also filed a parallel action in the District Court for the District of Columbia (*Pacific Far East Line, Inc. v. Federal Maritime Board, et al.*, C.A. No. 1708, filed July 11, 1957). As a result of detailed research petitioner believes that jurisdiction, formerly in the district courts, was vested in the Court of Appeals under the Review Act of 1950.

In their memoranda filed with this Court, which are little more than a bare statement of position, without authority, neither respondents nor intervener Matson has contended that the order is not judicially reviewable; they assert only that it is not reviewable by the Court of Appeals under the Review Act of 1950. However, in their answers filed in the district court action, both respondents and Matson have contended that the agency action in question is not judicially reviewable.³ It is plain that their instant motion is part of an overall strategy to defeat any review

² 5 U.S.C. §§ 1031 *et seq.*, also known as the Hobbs Act.

³ Defendants' Answer, Fifth Defense, and Matson's Answer, Sixth Defense, C.A. No. 1708, *supra*.

at all. The Court, therefore, should not be misled into thinking that respondents and intervener are urging only that judicial review of agency action should be in the district court rather than here. If respondents and intervener are successful, petitioner and others similarly situated will have no redress in any court for unlawful agency action.

THE ISSUE

Section 2 of the Review Act of 1950 vests jurisdiction in this Court to review orders of the Board or Administration "entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended" (46 U.S.C. §§ 801 *et seq.*, and 46 U.S.C. §§ 843 *et seq.*, respectively). Respondents argue (their motion, page 2), "Since the decision (or order) here in issue, was entered under authority of the Merchant Marine Act, 1936, the Review Act of 1950 clearly does not vest this Court with jurisdiction to review it". The issue then may be stated in statutory terms as whether the Merchant Marine Act, 1936, is part of the "Shipping Act, 1916, as amended", within the intendment of the Review Act of 1950, or, alternatively, whether orders under the 1936 Act are "entered under authority of the Shipping Act, 1916, as amended". In practical effect the issue is whether actions of the Federal Maritime Board and the Maritime Administration under the Merchant Marine Act, 1936, are to be wholly free of judicial review, and, if not, whether that review is to be in the district courts, or, as Congress clearly intended, in the Courts of Appeals, which with immaterial exceptions, have jurisdiction to review all other actions of the Board and Administration.

SUMMARY OF ARGUMENT

It is PFEL's contention that the Merchant Marine Act, 1936, is part of the "Shipping Act, 1916, as amended", within the meaning of the Review Act of 1950; that the Court may so find without resorting to the legislative history of the 1950 Act; that in any event, the Court may

properly resort to that legislative history in order to ascertain and effectuate the intention of Congress; that the legislative history shows that Congress clearly intended to vest jurisdiction in the Court of Appeals of "all reviewable orders" of the Federal Maritime Board and Maritime Administration; and that the order here is a judicially reviewable order, as evidenced by the 1936 Act and its amendments, the legislative history thereof, section 10 of the Administrative Procedure Act, the legislative history of the Review Act of 1950, and judicial precedent. Accordingly, the Court must find that the order is within the Review Act of 1950, and therefore subject to this Court's jurisdiction. In addition, independently of the foregoing, orders under the 1936 Act are "entered under authority of the Shipping Act, 1916, as amended". Respondents' contrary contentions would frustrate the purposes of the Review Act of 1950 and would lead to procedural chaos.

ARGUMENT

I. THE INTEGRAL RELATIONSHIP OF THE 1916 AND 1936 ACTS

The Shipping Act, 1916, was both regulatory and promotional in nature. It has been described by the Supreme Court as:

"a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land". *United States Navigation Co. v. Cunard Steamship Co., Ltd.*, 284 U.S. 479, 480-81 (1932).

Similarly, subsequent legislative enactments of a promotional and regulatory nature, such as the Merchant Marine Acts of 1920 (46 U.S.C. §§ 861 *et seq.*) and 1928 (46 U.S.C. §§ 891 *et seq.*), the Intercoastal Shipping Act of 1933 (46 U.S.C. §§ 843 *et seq.*), and the 1936 Act, bear a relation to the 1916 Act as amendments to the Interstate Commerce Act bear to that statute—the review provisions of which (Title 28, United States Code, Sections 1336, 2321) are not

reenacted with every amendment. The preamble to the 1936 Act and the declaration of policy stated in section 101 thereof are in most respects a restatement of the policy declared in the preamble to the 1916 Act.⁴ The 1936 Act both "amends" the basic shipping laws of the United States as represented in the 1916 Act and other amendments thereto, in the broadest sense, and in addition, directly and expressly amends the 1916 statute in numerous detailed respects.⁵ It is evident therefore that in a real sense, and petitioner believes, in the sense employed in the Review Act of 1950, the 1936 Act is part of the "Shipping Act, 1916, as amended". On this ground the Motions to Dismiss should be denied.

But even if the matter is viewed most unfavorably to petitioner the term "Shipping Act, 1916, as amended" is at least ambiguous;⁶ and where a statute is ambiguous resort to its legislative history is both proper and necessary in order to ascertain its meaning and effectuate the intention of Congress. The Supreme Court has held that even where the "plain meaning" of the wording of a statute is

⁴ Preamble, Shipping Act, 1916, 39 Stat. 728; Preamble, Merchant Marine Act, 1936, 49 Stat. 1985; § 101, Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. § 1101.

⁵ For example, the 1936 Act amends (by repealing) sections 3, 4, 5, 6, 7, 8, 10, 11, 35, and 43 of the 1916 Act, as amended, prior to 1936 (see section 903 of the 1936 Act). In addition, sections 204 and 904 of the 1936 Act amend the 1916 Act generally by substituting the Maritime Commission for the Shipping Board and by transferring to the Commission each of the functions, powers and duties formerly vested in the Shipping Board (and its successor the Shipping Board Bureau, see note 8, *infra*). Also, section 903(d) of the 1936 Act amended section 3 of the Intercoastal Shipping Act, 1933, which is likewise part of the "Shipping Act, 1916, as amended". See the preamble to the 1933 Act (43 Stat. 1425, approved March 3, 1933).

⁶ In fact, there has been no consistent usage by Congress in the terminology it has employed to designate the various shipping acts. The term "Shipping Act, 1916" was not employed even in the original 1916 Act, which did not become so known until the amendments enacted as Public Law 198, 65th Congress, approved July 15, 1918, 40 Stat. 900. And the 1933 Act was given a separate official citation (the "Intercoastal Shipping Act, 1933") even though its preamble specifically stated that it was "An Act Amending the Shipping Act, 1916, as amended . . ."

apparent it will not apply that meaning if it would lead to an unreasonable result “‘plainly at variance with the policy of the legislature as a whole’.” *United States v. American Trucking Associations*, 310 U.S. 534, 542-44 (1940); *United States v. Dickerson*, 310 U.S. 554, 561-562 (1940); *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1955). See also *Commissioner of Int. Rev. v. Church*, 335 U.S. 632, 682, 687-89 (1949) (cases collected in Appendix A to dissenting opinion of Frankfurter, J.); and *Federal Trade Commission v. Tuttle*, 244 F. 2d 605, 615 (1957). Accordingly, even if the plain meaning of the Review Act of 1950 were as respondents say, which it is not, the Court may resort to its legislative history. *United States v. Dickerson*, *supra*, at 562.

II. LEGISLATIVE HISTORY OF THE REVIEW ACT OF 1950

The Review Act of 1950 had four general purposes—(1) “To relieve the Supreme Court from the burden of hearing appeals as of right”, as under the Urgent Deficiencies Act; (2) “To provide a review as of right in an appellate court, that is in a circuit court of appeals”; (3) “To provide for review on certiorari in the Supreme Court”; and (4) “To improve the procedure on review”, of orders of the agencies named therein.⁷ With specific reference to the Maritime Commission (respondents’ predecessor),⁸ the legislative history of the 1950 Act unequivocally shows

⁷ Hearings before Subcommittee Nos. 3 and 4 of the Committee on the Judiciary, House of Representatives, on H. R. 1468, H. R. 1470, and H. R. 2271, 80th Congress, and before Subcommittee No. 2 on H. R. 2915 and H. R. 2916, 81st Congress (“Providing for the Review of Orders of Certain Agencies, etc.”), page 90.

⁸ Respondents Federal Maritime Board and Maritime Administration succeeded to the functions of the Maritime Commission by Reorganization Plan No. 21 of 1950, pursuant to the Reorganization Act of 1949, approved June 20, 1949. The original maritime agency was the Shipping Board, created by the 1916 Act, succeeded in 1933 by the Shipping Board Bureau, an agency within the Department of Commerce, and in turn by the Maritime Commission in 1936.

that Congress intended to cover thereunder *all* reviewable orders of the Maritime Commission. H. R. 2916, 81st Congress, 1st Session, a predecessor bill of that enacted as the Review Act of 1950, proposed that the courts of appeals would have jurisdiction to review only orders entered under authority of "sections 15, 17, 18 and 19 of the Shipping Act, 1916, as amended . . . and sections 3 and 4 of the Intercoastal Shipping Act, as amended . . ." On March 10, 1949, Paul D. Page, Jr., Solicitor, Maritime Commission, testified before a subcommittee of the House Judiciary Committee.⁹

"There are two particulars in which we feel that the act as drawn can be helped by amendment. The first is that we do not feel it is sufficiently all-inclusive. *We have never taken the position that any of our orders are not reviewable. We advocate judicial review of our orders.*

"The act as drawn specifies appeals from orders made under certain sections of our act. It omits that section under which a vast majority of our orders are issued, section 22 of the Shipping Act, 1916, and we feel, and this is shown in our written report, and I will not elaborate upon it, that *the provisions of this act should apply to all reviewable orders of the Maritime Commission*" (Emphasis supplied here and throughout this answer).

On April 1, 1949, Mr. Pages further stated (149-150):

MR. PAGE. Mr. Chairman, as it stood at the last hearing we were somewhat *fearful that the bill might have precluded review of some cases*, and there might also have been some confusion as to whether it conflicted with the specific provisions for review in the Shipping Act and possibly certain provisions in the Administrative Procedure Act.

Between Mr. Tolman and Judge Phillips' committee we have agreed upon an amendment which we feel *prevents any such possibility . . .*

⁹ *Op. cit. supra* note 7, at page 137.

The Chairman of the Commission similarly advised the subcommittee:

"In the opinion of the Commission, however, the provisions of the bill should be sharpened so as to make clear that the new procedure shall apply to *all reviewable orders* of the regulatory agencies involved . . .

"As now written, the bill applies to Maritime Commission orders issued under sections 15, 17, 18, and 19 of the Shipping Act, 1916 (46 U.S.C., Secs. 814-816-817-818) and sections 3 and 4 of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. secs. 845 and 845a). *The Commission issues other reviewable orders.* In view of the prime purpose of the bill it seems clear that *its minimum effect should be the substitution of the new procedure for the old with respect to all reviewable orders of the Commission.* At it stands the bill would not apply to orders other than those issued under the specified sections of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, and while the Commission has not been able to make a statistical investigation to ascertain the number of orders issued under various sections of the acts administered by the Commission, it can be definitely stated that the largest number of important regulatory orders which the Commission issues comes under section 22 of the Shipping Act, 1916. The bill as written would not alter existing procedure as to such orders, and therefore would clearly fail in its purpose of reducing the work load of the Supreme Court as much as possible.

"This suggestion in no way advocates that the bill be so drafted as to confer rights to review in addition to those now authorized by law, but is designed to secure uniform procedure with respect to *all reviewable orders*" (p. 145).

* * *

"Summarizing, the Maritime Commission agrees with the primary objective of the bill. It suggests amendment to the bill as heretofore indicated in order to make the procedure set out more effective, by making it cover *all reviewable orders*, and by insuring to the Maritime Commission and like agencies full and independent representation in the courts" (p. 147).

The amendment proposed by Mr. Page and the Commission's Chairman was precisely that adopted in the final Act. Thus, the legislative history of the Review Act is conclusive evidence of an overriding intention by Congress that the Review Act should embrace *all* judicially reviewable orders—and Congress adopted *verbatim* the language which the Maritime Commission advised it would accomplish that end. Nowhere was there any indication of an intention to exclude orders relating to the 1936 Act. Cf. *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947, 949 (2d Cir. 1954). Respondents, as the Commission's successor agencies, should not now be heard to argue that the language adopted by Congress at the behest of the Commission was ineffectual, or that the Commission had some secret reservation, uncommunicated to Congress. The only remaining inquiry for the Court, therefore, is whether the order of which review is here sought is a "judicially reviewable" order.

III. THE ORDER IS JUDICIALLY REVIEWABLE

PFEL is not asking the Court on review to substitute its judgment for that of respondent agencies. PFEL, rather, has alleged that the Board and Administration have acted upon erroneous interpretations of law and that their decision is arbitrary, an abuse of discretion, and not based on substantial evidence—traditional standards of judicial review of agency action. Nor is the subject matter of the action or the substantive statute primarily involved (section 805(a) of the Merchant Marine Act, 1936) unique in any respect. On the contrary, the standard by which an application under section 805(a) is measured is of a kind with the ordinary test of "public convenience and necessity" or "public interest" with which reviewing courts are fully familiar, expressed in section 805(a) in terms of "prejudic[e] to the objects and policy of the Act", "public interest and convenience", and "unfair competition".

In this connection, it is significant that section 805(a) was analogized to the public convenience and necessity provisions of the Motor Carriers Act (Part II of the Inter-

state Commerce Act), both during hearings preceding the passage of the 1936 Act, and in the final report of the Senate Commerce Committee.¹⁰ Orders under the Motor Carriers Act, as under similar regulatory statutes, are, of course, judicially reviewable.

A. The Administrative Procedure Act.

To determine judicial reviewability, it seems necessary to go back only to the Administrative Procedure Act, section 10 of which provides for a right of judicial review "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion". No statute precludes judicial review of orders denying written permission under section 805(a) and no law cited by respondents or otherwise commits such action solely to agency discretion. As noted *supra*, the Maritime Commission representative testified before the Judiciary subcommittee considering the Review Act of 1950:

"We have never taken the position that any of our orders are not reviewable. We advocate judicial review of our orders."

It was squarely held in *American President Lines, Ltd. v. Federal Maritime Board*, 112 F. Supp. 346 (D.C. 1953) (further discussed, *infra*), on the authority of section 10, that unlawful agency action under the 1936 Act is judicially reviewable.

B. Review Provisions of the Shipping Act, 1916, as Amended by the 1936 Act.

Procedures for review of unlawful agency action (principally the Interstate Commerce Commission) had been developed long prior to the 1916 Act. In considering the 1916 Act, the primary concern of Congress in this regard was not whether orders of the Shipping Board would be reviewable, but the appropriate forum and procedure for

¹⁰ Hearings before the Senate Committee on Commerce on S. 3500, 74th Congress, 2d Session (1936), pages 88-89; and Senate Report 1721, accompanying S. 3500, 74th Congress, 2d Session (1936), page 19.

review.¹¹ The matter was resolved in section 31 of the 1916 Act, which stated:

“SEC. 31. That the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.”

Thus, section 31 presupposes a right of review and applies thereto the same venue and procedure available with respect to Interstate Commerce Commission actions.

Evidence of a Congressional intention that this provision be carried forward with respect to the 1936 Act is found in two separate provisions of the 1936 Act. Section 904 of the 1936 Act provided that:

“SEC. 904. Whenever the words ‘United States Shipping Board’ or the words ‘the Board’ are used in any prior Act, such Acts are hereby amended so that such words shall be applicable to the United States Maritime Commission.”

Accordingly, section 31, of the Shipping Act, 1916, *supra*, as amended by section 904 of the 1936 Act, now in terms applies to “any order of the Maritime Commission”, or its successor agencies, the Board and Administration.

Moreover, section 204 vested in the Maritime Commission “all the functions, powers, and duties” of the former Shipping Board (section 204(a)). It was a “function, power, and duty” of the Shipping Board to defend the validity of its orders in court subject to the provisions of section 31, Shipping Act, 1916, and it was no less a “function, power, and duty” of the Maritime Commission to defend its orders relating to the 1936 Act.

¹¹ See House Hearings on H. R. 14337 (1916), pages 7, 74, 140-141; Senate Hearings on H. R. 15455 (1916), page 47; Senate Report 689 on H. R. 15455 (1916), pages 13-14; and 53 Cong. Rec. 8081 (1916).

C. Legislative History of the 1936 Act.

The legislative history of the 1936 Act, particularly that portion dealing with periodic agency review and readjustment of subsidy payments (present section 606 of the 1936 Act), resolves any possible doubt. Section 507 of the original bill (S. 2582, 74th Congress, 1st Session, 1935), provided for such review and readjustment and proposed a detailed procedure for judicial review of any agency determinations in connection therewith. The United States Shipping Board Bureau,¹² through its Director, Mr. Peacock, who was a principal committee witness, objected to the proposal as drafted as a "rather cumbersome procedure" and recommended that it be omitted in its entirety—a recommendation ultimately accepted. The Shipping Board Bureau urged that the new agency be permitted the "fullest exercise of discretion" but at the same time stated that even if the proposal were omitted, as it recommended, "*if there is any gross abuse of discretion by the authorities administering this subsidy, the regular processes of law would ordinarily afford a sufficient protection*".¹³ The "regular processes of law" previously avail-

¹² See note 8, *supra*.

¹³ Hearings before the Senate Committee on Commerce on S. 2582, 74th Congress, 1st Session (1935), pages 21, 100-101. The following appears at page 21:

MR. PEACOCK. We have suggested that if there is any gross abuse of discretion by the authorities administering this subsidy, *the regular processes of law would ordinarily afford a sufficient protection.*

* * *

THE CHAIRMAN. Mr. Peacock, *what the committee had in mind* in inserting this language *was to provide for that good old American right of appeal.* Do you question the propriety of having such appeal?

MR. PEACOCK. Not at all.

THE CHAIRMAN. But your question is to the form in which it is provided here?

MR. PEACOCK. That is the only objection—to the form. Having practiced law in Washington in Government matters for 15 years myself, *I feel that the regular legal processes offer practically all that is needed here.*

See also Hearings before the House Committee on Merchant Marine and Fisheries, on H. R. 7521, 74th Congress, 1st Session (1935), pages 383-384.

able under the shipping laws were, of course, prescribed by section 31 of the 1916 Act. Mr. Peacock's statements to both the Senate and the House Committees, and comments by the Senate Committee Chairman, reflect a clear understanding that even without express provision for judicial review—and even as to such matters as the determination of the size of subsidy payments, which by their nature are fraught with broad policy implications and as well involve an unusual degree of agency “expertise”—an interested party would have a right of judicial review to correct “abuse” of discretion. That the same “regular processes of law” would protect a company from unlawful agency action under a purely regulatory-type provision such as section 805(a) must be an *a fortiori* conclusion.

Subsequently in the 1935 hearings, a member of the House Committee on Merchant Marine and Fisheries briefly questioned the advisability of permitting judicial review with respect to subsidy adjustments¹⁴—but there is no indication of any decision by that committee or by Congress to preclude review even in that instance, much less of any intention to preclude review generally. On the contrary, while there was a difference of opinion during the Senate Committee hearings in 1936 as to the scope of judicial review with respect to subsidy adjustments, even the more restricted view would have permitted appeal to the courts in the event of “gross abuse of discretion.”¹⁵

¹⁴ Hearings before House Committee on Merchant Marine and Fisheries on H. R. 7521, 74th Congress, 1st Session (1935), pages 701-702.

¹⁵ Hearings before the Senate Committee on Commerce on S. 3500, 74th Congress, 2d Session (1936), pages 115-117. At one point the Senate Committee Chairman challenged a witness advocating the narrower review, as follows:

THE CHAIRMAN. Just a moment on that matter. With our view of American government, is there any reason why an operator who felt that he had not had a fair deal and that the decision was not sufficient to give him parity, is there anything abusive in our opposition [sic] to our recognized system in America that he shall have an appeal to the courts? (p. 116.)

Thus, there is affirmative evidence both on the face of the statute and in its legislative history of Congress' intention to make orders under the 1936 Act judicially reviewable. But even had Congress remained silent on the question, the Supreme Court has held, since before the Administrative Procedure Act, that statutory silence as to judicial review does not preclude review. *Stark v. Wickard*, 321 U. S. 288 (1944). The House Judiciary Committee stated, in considering the Administrative Procedure Act:

"To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." (Legislative History of the Administrative Procedure Act, Senate Document 248, 79th Congress, 2d Sess. (1946), page 275).

Subsequently the Supreme Court has not only reaffirmed its holding in *Stark v. Wickard*, *supra*,¹⁶ but has also indicated that whatever was the scope of reviewability of administrative action prior to the Act, it has since been expanded,¹⁷ and that, "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed". *Marcello v. Bonds*, 349 U. S. 302, 310 (1955).

This Court also has emphatically reaffirmed the principle of judicial review as provided for in the Administrative Procedure Act:

"Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial re-

¹⁶ *Estep v. United States*, 327 U. S. 114 (1946); *Federal Reserve System v. Agnew*, 329 U. S. 441 (1947); *United States v. Interstate Commerce Commission*, 337 U. S. 426 (1949).

¹⁷ *Heikkila v. Barber*, 345 U. S. 229 (1953); *Shaughnessy v. Pedreiro*, 349 U. S. 48 (1955); *Brownell v. Tom We Skung*, 352 U. S. 182 (1956). And see *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924, 933, *cert. denied* 350 U. S. 884 (1955).

view would be completely immaterial. (Senate Document 248, *supra*, page 368. See also page 384.)' " *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F. 2d 685, 689 (D.C. Cir.), *cert. denied* 342 U. S. 849 (1951).

And in *Fleming v. Moberly Milk Products Co.*, 160 F. 2d 259, 265 (D. C. Cir.), *cert. dismissed* 331 U. S. 786 (1947), this Court declared:

"If the judiciary has no power in such matter, the only practical restraint would be the self-restraint of the executive branch. Such a result is foreign to our concept of the division of the powers of government."

D. The American President Lines Decision.

Reviewability of orders of the Federal Maritime Board under the Merchant Marine Act, 1936 was considered at length in *American President Lines, Ltd. v. Federal Maritime Board, et al.*, *supra*. The court held that while it would not substitute itself for the Board "within the ambit of matters committed to agency discretion", Board action was nevertheless judicially reviewable to be certain that statutory restrictions and procedures had not been transcended.¹⁸

In the *American President Lines* case, the court without comment rejected the Board's argument¹⁹ that since the 1936 Act expressly provided for review in four specialized circumstances,²⁰ its silence elsewhere indicated an

¹⁸ In its comments on judicial review under section 10 of the Administrative Procedure Act, the House Judiciary Committee stated, "In any case the existence of discretion does not prevent a person from bringing agency action but merely prevents him *pro tanto* from prevailing therein." Legislative History of the Administrative Procedure Act, Senate Document 248, 79th Congress, 2d Session, page 275. See *Homovich v. Chapman*, 191 F. 2d 761, 764 (D.C. Cir. 1951).

¹⁹ Its Memorandum of Points and Authorities in Support of Cross Motion for Summary Judgment, C. A. No. 13-53 (April 27, 1953), page 16.

²⁰ Section 402 (termination of ocean mail contracts under the Merchant Marine Act of 1928); section 611 (transfer of vessels to foreign registry, upon default by the Government under a subsidy contract); section 902 (just compensation for requisitioned vessels); section 1212 (relating to war-risk insurance).

intention to preclude review in all other cases. The Board's argument was clearly without merit, and properly rejected by the court, since in fact, as shown above, Congress was *not* silent on the subject. Moreover, the four situations in which express provision for review was made were unique and complicated, and in each instance Congress provided a specialized review procedure at variance with those available by the "regular processes of law" to which Mr. Peacock referred.²¹

It perhaps should be noted that in the memoranda filed in *American President Lines* it was argued that if the order there was reviewable, exclusive jurisdiction was vested in the Court of Appeals under the Review Act of 1950. Memorandum of Points and Authorities in Support of Motion of Defendant Pacific Far East Line, Inc., for Summary Judgment, C.A. No. 13-52 (May 8, 1953), page 2. The district court did not consider this argument in its opinion.

IV. ORDERS UNDER THE 1936 ACT ARE IN ANY EVENT "ENTERED UNDER AUTHORITY OF THE 1916 ACT"

There is additional evidence of Congressional intention. Section 23 of the 1916 Act originally provided that orders of the Shipping Board were to be effective for two years. In 1939, section 23 was amended to provide that,

"All orders of the United States Maritime Commission, other than for the payment of money, made under this Act, *as amended or supplemented*, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless

²¹ The Board in *American President Lines* relied on *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943), which, however, was decided prior to *Stark v. Wickard*, *supra*, and to the Administrative Procedure Act. It rested upon a clear mandate from Congress to preclude judicial review of explosive labor jurisdictional disputes, and has since been limited. *Steele v. Louisville & Nashville Ry. Co.*, 323 U.S. 192 (1944); *Order of Ry. Conductors v. Swan*, 329 U.S. 520 (1947); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). See also *Airline Dispatchers Ass'n v. National Mediation Board*, *supra*.

the same shall be suspended, or modified, or set aside by the Commission, *or be suspended or set aside by a court of competent jurisdiction.*"

Congress in 1939 clearly understood that section 23 applied to orders issued under the 1936 Act, since that act at a minimum was part of the 1916 Act as "supplemented". Thus, orders under the 1936 Act are entered under authority of section 23 of the 1916 Act and hence "under authority of the Shipping Act, 1916", as that term is employed in the Review Act of 1950.

Moreover, as amended, section 23 expressly recognizes that orders under the 1936 Act may be "suspended or set aside by a court of competent jurisdiction", *i.e.*, that they are judicially reviewable. Finally, the term "orders" as used in section 31 of the 1916 Act is clearly synonymous with the term "orders" as used in section 23—there is not the slightest indication to the contrary. As section 23 embraces orders under the 1936 Act so too does section 31.

In conclusion, since the Review Act of 1950, at the Commission's own insistence, is applicable to *all* reviewable orders, and since, as has been clearly demonstrated, orders issued under the 1936 Act are reviewable, the Court should find that the order here is within this Court's jurisdiction under the Review Act of 1950.

V. RESPONDENT'S CONTENTION WOULD LEAD TO PROCEDURAL CHAOS

Procedural chaos would result from respondents' contention that no order entered under the 1936 Act could be reviewed under the Review Act of 1950:

A. The avowed purpose of the Review Act of 1950 would be frustrated in a major respect, and jurisdiction to review the orders of the Board and Administration would be arbitrarily divided between the Courts of Appeals and the various district courts. If it should be held that orders

under the 1936 Act are not judicially reviewable, petitioner and others similarly situated would have no redress whatever from unlawful agency orders under the 1936 Act.

B. In a recent rule-making proceeding under sections 15, 16, 17, and 21 of the 1916 Act (*inter alia*), the Board has held that its general rule-making power is derived from section 204 of the 1936 Act.²² If respondent should prevail, no order entered in a rule-making proceeding, even where relating to specific provisions of the 1916 Act, would be reviewable.

C. Section 205 of the 1936 Act is purely and simply a regulatory provision *in pari materia* with sections 14, 15, 16, 17 and 18 of the 1916 Act. If respondents' theory prevails, orders entered in proceedings under sections 14, 15, 16, 17 or 18 of the 1916 Act would be reviewable in the Courts of Appeals, while orders under section 205 in the same proceeding and dealing with the same subject matter apparently would either be reviewable only in the district courts or not reviewable at all.²³

The Review Act of 1950 was designed to avoid such incongruities, not to foster them.

CONCLUSION

The overwhelming import of all available evidence requires the conclusion that orders such as that of which review is here sought are judicially reviewable, and that Congress plainly intended, and provided, that review should

²² In the Matter of the Notice of Proposed Rule Making—Business Practices of Freight Forwarders (46 C.F.R. Part 244), Report of the Board on Petition to Dismiss, served August 21, 1957.

²³ That this is no mere academic possibility is illustrated by the recent Board decision in *Encinal Terminals v. Pacific Westbound Conference*, FMB Docket No. 790, report served June 28, 1957, where the complaint alleged violations of sections 14, 15, 16, 17 and 36 of the 1916 Act and section 205 of the 1936 Act. The Board found a violation of section 205 and accordingly held that it was "unnecessary" to consider the allegation under the other sections cited. In so doing, under the contentions it has advanced here and in the district court, it thereby precluded judicial review of its cease and desist order.

be in this Court. Respondents and intervenor have wholly failed to prove the contrary, and their motions must be regarded as part of their overall attempt to deprive petitioner of its right to relief from improper agency action and to withhold that action from judicial review. The motions to dismiss should be denied.

Respectfully submitted,

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September 23, 1957

PETITIONER'S ANSWER TO RESPONDENTS' AND INTER-
VENER'S MOTIONS TO DISMISS FOR LACK
OF JURISDICTION

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,007

FILED SEP 23 1957

PACIFIC FAR EAST LINE, INC., *Petitioner*,^{CLERK}

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*.

Petition for Review of Order of the Federal Maritime Board
and Maritime Administration

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IN THE
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No. 14,007

PACIFIC FAR EAST LINE, INC., *Petitioner*,
v.
UNITED STATES OF AMERICA, ET AL., *Respondents*.

**Petition for Review of Order of the Federal Maritime Board
and Maritime Administration**

**PETITIONER'S ANSWER TO RESPONDENTS' AND INTER-
VENER'S MOTIONS TO DISMISS FOR LACK
OF JURISDICTION**

Petitioner Pacific Far East Line, Inc. ("PFEL") hereby opposes the motion of respondents Federal Maritime Board, Maritime Administration, and Clarence G. Morse, Maritime Administrator, concurred in by respondent United States of America, and the motion of intervener Matson Navigation Company ("Matson"), to dismiss the petition for review for lack of jurisdiction.¹

¹ Matson's motion to dismiss merely adopts the grounds urged in behalf of respondents' motion. PFEL's answer hereafter refers primarily to respondents' motion.

PRELIMINARY STATEMENT

The petition, filed under the Review Act of 1950,² seeks review of respondents' order denying PFEL's application for written permission under section 805(a), Merchant Marine Act, 1936 (46 U.S.C. §§ 1101 *et seq.*), to operate vessels carrying cargo between the Pacific Coast of the United States and Hawaii. Respondents' report and order (Exhibit 1 to the petition for review) were entered following a formal public hearing held pursuant to section 805(a), which is a "public convenience and necessity"-type statute applicable to domestic trade operations by carriers holding operating-differential subsidy contracts in the foreign trades. PFEL believes that the order is unquestionably a judicially reviewable order. However, because it has never been definitively determined whether jurisdiction is in the Court of Appeals under the Review Act of 1950 or in the district courts (see PFEL's petition, page 2, note 3), PFEL has also filed a parallel action in the District Court for the District of Columbia (*Pacific Far East Line, Inc. v. Federal Maritime Board, et al.*, C.A. No. 1708, filed July 11, 1957). As a result of detailed research petitioner believes that jurisdiction, formerly in the district courts, was vested in the Court of Appeals under the Review Act of 1950.

In their memoranda filed with this Court, which are little more than a bare statement of position, without authority, neither respondents nor intervener Matson has contended that the order is not judicially reviewable; they assert only that it is not reviewable by the Court of Appeals under the Review Act of 1950. However, in their answers filed in the district court action, both respondents and Matson have contended that the agency action in question is not judicially reviewable.³ It is plain that their instant motion is part of an overall strategy to defeat any review

² 5 U.S.C. §§ 1031 *et seq.*, also known as the Hobbs Act.

³ Defendants' Answer, Fifth Defense, and Matson's Answer, Sixth Defense, C.A. No. 1708, *supra*.

at all. The Court, therefore, should not be misled into thinking that respondents and intervener are urging only that judicial review of agency action should be in the district court rather than here. If respondents and intervener are successful, petitioner and others similarly situated will have no redress in any court for unlawful agency action.

THE ISSUE

Section 2 of the Review Act of 1950 vests jurisdiction in this Court to review orders of the Board or Administration "entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended" (46 U.S.C. §§ 801 *et seq.*, and 46 U.S.C. §§ 843 *et seq.*, respectively). Respondents argue (their motion, page 2), "Since the decision (or order) here in issue was entered under authority of the Merchant Marine Act, 1936, the Review Act of 1950 clearly does not vest this Court with jurisdiction to review it". The issue then may be stated in statutory terms as whether the Merchant Marine Act, 1936, is part of the "Shipping Act, 1916, as amended", within the intendment of the Review Act of 1950, or, alternatively, whether orders under the 1936 Act are "entered under authority of the Shipping Act, 1916, as amended". In practical effect, the issue is whether actions of the Federal Maritime Board and the Maritime Administration under the Merchant Marine Act, 1936, are to be wholly free of judicial review, and, if not, whether that review is to be in the district courts, or, as Congress clearly intended, in the Courts of Appeals, which with immaterial exceptions, have jurisdiction to review all other actions of the Board and Administration.

SUMMARY OF ARGUMENT

It is PFEL's contention that the Merchant Marine Act, 1936, is part of the "Shipping Act, 1916, as amended", within the meaning of the Review Act of 1950; that the Court may so find without resorting to the legislative history of the 1950 Act; that in any event, the Court may

properly resort to that legislative history in order to ascertain and effectuate the intention of Congress; that the legislative history shows that Congress clearly intended to vest jurisdiction in the Court of Appeals of "all reviewable orders" of the Federal Maritime Board and Maritime Administration; and that the order here is a judicially reviewable order, as evidenced by the 1936 Act and its amendments, the legislative history thereof, section 10 of the Administrative Procedure Act, the legislative history of the Review Act of 1950, and judicial precedent. Accordingly, the Court must find that the order is within the Review Act of 1950, and therefore subject to this Court's jurisdiction. In addition, independently of the foregoing, orders under the 1936 Act are "entered under authority of the Shipping Act, 1916, as amended". Respondents' contrary contentions would frustrate the purposes of the Review Act of 1950 and would lead to procedural chaos.

ARGUMENT

I. THE INTEGRAL RELATIONSHIP OF THE 1916 AND 1936 ACTS

The Shipping Act, 1916, was both regulatory and promotional in nature. It has been described by the Supreme Court as:

"a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land". *United States Navigation Co. v. Cunard Steamship Co., Ltd.*, 284 U.S. 479, 480-81 (1932).

Similarly, subsequent legislative enactments of a promotional and regulatory nature, such as the Merchant Marine Acts of 1920 (46 U.S.C. §§ 861 *et seq.*) and 1928 (46 U.S.C. §§ 891 *et seq.*), the Intercoastal Shipping Act of 1933 (46 U.S.C. §§ 843 *et seq.*), and the 1936 Act, bear a relation to the 1916 Act as amendments to the Interstate Commerce Act bear to that statute—the review provisions of which (Title 28, United States Code, Sections 1336, 2321) are not

reenacted with every amendment. The preamble to the 1936 Act and the declaration of policy stated in section 101 thereof are in most respects a restatement of the policy declared in the preamble to the 1916 Act.⁴ The 1936 Act both "amends" the basic shipping laws of the United States as represented in the 1916 Act and other amendments thereto, in the broadest sense, and, in addition, directly and expressly amends the 1916 statute in numerous detailed respects.⁵ It is evident therefore that in a real sense, and petitioner believes, in the sense employed in the Review Act of 1950, the 1936 Act is part of the "Shipping Act, 1916, as amended". On this ground the Motions to Dismiss should be denied.

But even if the matter is viewed most unfavorably to petitioner the term "Shipping Act, 1916, as amended" is at least ambiguous;⁶ and where a statute is ambiguous resort to its legislative history is both proper and necessary in order to ascertain its meaning and effectuate the intention of Congress. The Supreme Court has held that even where the "plain meaning" of the wording of a statute is

⁴ Preamble, Shipping Act, 1916, 39 Stat. 728; Preamble, Merchant Marine Act, 1936, 49 Stat. 1985; § 101, Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. § 1101.

⁵ For example, the 1936 Act amends (by repealing) sections 3, 4, 5, 6, 7, 8, 10, 11, 35, and 43 of the 1916 Act, as amended, prior to 1936 (see section 903 of the 1936 Act). In addition, sections 204 and 904 of the 1936 Act amend the 1916 Act generally by substituting the Maritime Commission for the Shipping Board and by transferring to the Commission each of the functions, powers and duties formerly vested in the Shipping Board (and its successor the Shipping Board Bureau, see note 8, *infra*). Also, section 903(d) of the 1936 Act amended section 3 of the Intercoastal Shipping Act, 1933, which is likewise part of the "Shipping Act, 1916, as amended". See the preamble to the 1933 Act (43 Stat. 1425, approved March 3, 1933).

⁶ In fact, there has been no consistent usage by Congress in the terminology it has employed to designate the various shipping acts. The term "Shipping Act, 1916" was not employed even in the original 1916 Act, which did not become so known until the amendments enacted as Public Law 198, 65th Congress, approved July 15, 1918, 40 Stat. 900. And the 1933 Act was given a separate official citation (the "Intercoastal Shipping Act, 1933") even though its preamble specifically stated that it was "An Act Amending the Shipping Act, 1916, as amended . . ."

apparent it will not apply that meaning if it would lead to an unreasonable result “‘plainly at variance with the policy of the legislature as a whole’.” *United States v. American Trucking Associations*, 310 U.S. 534, 542-44 (1940); *United States v. Dickerson*, 310 U.S. 554, 561-562 (1940); *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1955). See also *Commissioner of Int. Rev. v. Church*, 335 U.S. 632, 682, 687-89 (1949) (cases collected in Appendix A to dissenting opinion of Frankfurter, J.); and *Federal Trade Commission v. Tuttle*, 244 F. 2d 605, 615 (1957). Accordingly, even if the plain meaning of the Review Act of 1950 were as respondents say, which it is not, the Court may resort to its legislative history. *United States v. Dickerson*, *supra*, at 562.

II. LEGISLATIVE HISTORY OF THE REVIEW ACT OF 1950

The Review Act of 1950 had four general purposes—(1) “To relieve the Supreme Court from the burden of hearing appeals as of right”, as under the Urgent Deficiencies Act; (2) “To provide a review as of right in an appellate court, that is in a circuit court of appeals”; (3) “To provide for review on certiorari in the Supreme Court”; and (4) “To improve the procedure on review”, of orders of the agencies named therein.⁷ With specific reference to the Maritime Commission (respondents’ predecessor),⁸ the legislative history of the 1950 Act unequivocally shows

⁷ Hearings before Subcommittee Nos. 3 and 4 of the Committee on the Judiciary, House of Representatives, on H. R. 1468, H. R. 1470, and H. R. 2271, 80th Congress, and before Subcommittee No. 2 on H. R. 2915 and H. R. 2916, 81st Congress (“Providing for the Review of Orders of Certain Agencies, etc.”), page 90.

⁸ Respondents Federal Maritime Board and Maritime Administration succeeded to the functions of the Maritime Commission by Reorganization Plan No. 21 of 1950, pursuant to the Reorganization Act of 1949, approved June 20, 1949. The original maritime agency was the Shipping Board, created by the 1916 Act, succeeded in 1933 by the Shipping Board Bureau, an agency within the Department of Commerce, and in turn by the Maritime Commission in 1936.

that Congress intended to cover thereunder *all* reviewable orders of the Maritime Commission. H. R. 2916, 81st Congress, 1st Session, a predecessor bill of that enacted as the Review Act of 1950, proposed that the courts of appeals would have jurisdiction to review only orders entered under authority of "sections 15, 17, 18 and 19 of the Shipping Act, 1916, as amended . . . and sections 3 and 4 of the Intercoastal Shipping Act, as amended . . ." On March 10, 1949, Paul D. Page, Jr., Solicitor, Maritime Commission, testified before a subcommittee of the House Judiciary Committee.⁹

"There are two particulars in which we feel that the act as drawn can be helped by amendment. The first is that we do not feel it is sufficiently all-inclusive. *We have never taken the position that any of our orders are not reviewable. We advocate judicial review of our orders.*

"The act as drawn specifies appeals from orders made under certain sections of our act. It omits that section under which a vast majority of our orders are issued, section 22 of the Shipping Act, 1916, and we feel, and this is shown in our written report, and I will not elaborate upon it, that *the provisions of this act should apply to all reviewable orders of the Maritime Commission*" (Emphasis supplied here and throughout this answer).

On April 1, 1949, Mr. Page further stated (149-150):

MR. PAGE. Mr. Chairman, as it stood at the last hearing we were somewhat *fearful that the bill might have precluded review of some cases*, and there might also have been some confusion as to whether it conflicted with the specific provisions for review in the Shipping Act and possibly certain provisions in the Administrative Procedure Act.

Between Mr. Tolman and Judge Phillips' committee we have agreed upon an amendment which we feel *prevents any such possibility . . .*

⁹ *Op. cit. supra* note 7, at page 137.

The Chairman of the Commission similarly advised the subcommittee:

"In the opinion of the Commission, however, the provisions of the bill should be sharpened so as to make clear that the new procedure shall apply to *all reviewable orders* of the regulatory agencies involved . . .

"As now written, the bill applies to Maritime Commission orders issued under sections 15, 17, 18, and 19 of the Shipping Act, 1916 (46 U.S.C., Secs. 814-816-817-818) and sections 3 and 4 of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. secs. 845 and 845a). *The Commission issues other reviewable orders.* In view of the prime purpose of the bill it seems clear that *its minimum effect should be the substitution of the new procedure for the old with respect to all reviewable orders of the Commission.* As it stands the bill would not apply to orders other than those issued under the specified sections of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, and while the Commission has not been able to make a statistical investigation to ascertain the number of orders issued under various sections of the acts administered by the Commission, it can be definitely stated that the largest number of important regulatory orders which the Commission issues comes under section 22 of the Shipping Act, 1916. The bill as written would not alter existing procedure as to such orders, and therefore would clearly fail in its purpose of reducing the work load of the Supreme Court as much as possible.

"This suggestion in no way advocates that the bill be so drafted as to confer rights to review in addition to those now authorized by law, but is designed to secure uniform procedure with respect to *all reviewable orders*" (p. 145).

* * *

"Summarizing, the Maritime Commission agrees with the primary objective of the bill. It suggests amendment to the bill as heretofore indicated in order to make the procedure set out more effective, by making it cover *all reviewable orders*, and by insuring to the Maritime Commission and like agencies full and independent representation in the courts" (p. 147).

The amendment proposed by Mr. Page and the Commission's Chairman was precisely that adopted in the final Act. Thus, the legislative history of the Review Act is conclusive evidence of an overriding intention by Congress that the Review Act should embrace *all* judicially reviewable orders—and Congress adopted *verbatim* the language which the Maritime Commission advised it would accomplish that end. Nowhere was there any indication of an intention to exclude orders relating to the 1936 Act. Cf. *D. L. Piazza Co. v. West Coast Line*, 210 F. 2d 947, 949 (2d Cir. 1954). Respondents, as the Commission's successor agencies, should not now be heard to argue that the language adopted by Congress at the behest of the Commission was ineffectual, or that the Commission had some secret reservation, uncommunicated to Congress. The only remaining inquiry for the Court, therefore, is whether the order of which review is here sought is a "judicially reviewable" order.

III. THE ORDER IS JUDICIALLY REVIEWABLE

PFEL is not asking the Court on review to substitute its judgment for that of respondent agencies. PFEL, rather, has alleged that the Board and Administration have acted upon erroneous interpretations of law and that their decision is arbitrary, an abuse of discretion, and not based on substantial evidence—traditional standards of judicial review of agency action. Nor is the subject matter of the action or the substantive statute primarily involved (section 805(a) of the Merchant Marine Act, 1936) unique in any respect. On the contrary, the standard by which an application under section 805(a) is measured is of a kind with the ordinary test of "public convenience and necessity" or "public interest" with which reviewing courts are fully familiar, expressed in section 805(a) in terms of "prejudic[e] to the objects and policy of the Act", "public interest and convenience", and "unfair competition".

In this connection, it is significant that section 805(a) was analogized to the public convenience and necessity provisions of the Motor Carriers Act (Part II of the Inter-

state Commerce Act), both during hearings preceding the passage of the 1936 Act, and in the final report of the Senate Commerce Committee.¹⁰ Orders under the Motor Carriers Act, as under similar regulatory statutes, are, of course, judicially reviewable.

A. The Administrative Procedure Act.

To determine judicial reviewability, it seems necessary to go back only to the Administrative Procedure Act, section 10 of which provides for a right of judicial review "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion". No statute precludes judicial review of orders denying written permission under section 805(a) and no law cited by respondents or otherwise commits such action solely to agency discretion. As noted *supra*, the Maritime Commission representative testified before the Judiciary subcommittee considering the Review Act of 1950:

"We have never taken the position that any of our orders are not reviewable. We advocate judicial review of our orders."

It was squarely held in *American President Lines, Ltd. v. Federal Maritime Board*, 112 F. Supp. 346 (D.C. 1953) (further discussed, *infra*), on the authority of section 10, that unlawful agency action under the 1936 Act is judicially reviewable.

B. Review Provisions of the Shipping Act, 1916, as Amended by the 1936 Act.

Procedures for review of unlawful agency action (principally the Interstate Commerce Commission) had been developed long prior to the 1916 Act. In considering the 1916 Act, the primary concern of Congress in this regard was not whether orders of the Shipping Board would be reviewable, but the appropriate forum and procedure for

¹⁰ Hearings before the Senate Committee on Commerce on S. 3500, 74th Congress, 2d Session (1936), pages 88-89; and Senate Report 1721, accompanying S. 3500, 74th Congress, 2d Session (1936), page 19.

review.¹¹ The matter was resolved in section 31 of the 1916 Act, which stated:

“SEC. 31. That the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.”

Thus, section 31 presupposes a right of review and applies thereto the same venue and procedure available with respect to Interstate Commerce Commission actions.

Evidence of a Congressional intention that this provision be carried forward with respect to the 1936 Act is found in two separate provisions of the 1936 Act. Section 904 of the 1936 Act provided that:

“SEC. 904. Whenever the words ‘United States Shipping Board’ or the words ‘the Board’ are used in any prior Act, such Acts are hereby amended so that such words shall be applicable to the United States Maritime Commission.”

Accordingly, section 31 of the Shipping Act, 1916, *supra*, as amended by section 904 of the 1936 Act, now in terms applies to “any order of the Maritime Commission”, or its successor agencies, the Board and Administration.

Moreover, section 204 vested in the Maritime Commission “all the functions, powers, and duties” of the former Shipping Board (section 204(a)). It was a “function, power, and duty” of the Shipping Board to defend the validity of its orders in court subject to the provisions of section 31, Shipping Act, 1916, and it was no less a “function, power, and duty” of the Maritime Commission to defend its orders relating to the 1936 Act.

¹¹ See House Hearings on H. R. 14337 (1916), pages 7, 74, 140-141; Senate Hearings on H. R. 15455 (1916), page 47; Senate Report 689 on H. R. 15455 (1916), pages 13-14; and 53 Cong. Rec. 8081 (1916).

C. Legislative History of the 1936 Act.

The legislative history of the 1936 Act, particularly that portion dealing with periodic agency review and readjustment of subsidy payments (present section 606 of the 1936 Act), resolves any possible doubt. Section 507 of the original bill (S. 2582, 74th Congress, 1st Session, 1935) provided for such review and readjustment and proposed a detailed procedure for judicial review of any agency determinations in connection therewith. The United States Shipping Board Bureau,¹² through its Director, Mr. Peacock, who was a principal committee witness, objected to the proposal as drafted as a "rather cumbersome procedure" and recommended that it be omitted in its entirety—a recommendation ultimately accepted. The Shipping Board Bureau urged that the new agency be permitted the "fullest exercise of discretion" but at the same time stated that even if the proposal were omitted, as it recommended, "*if there is any gross abuse of discretion by the authorities administering this subsidy, the regular processes of law would ordinarily afford a sufficient protection*".¹³ The "regular processes of law" previously avail-

¹² See note 8, *supra*.

¹³ Hearings before the Senate Committee on Commerce on S. 2582, 74th Congress, 1st Session (1935), pages 21, 100-101. The following appears at page 21:

MR. PEACOCK. We have suggested that if there is any gross abuse of discretion by the authorities administering this subsidy, *the regular processes of law would ordinarily afford a sufficient protection*.

* * *

THE CHAIRMAN. Mr. Peacock, *what the committee had in mind in inserting this language was to provide for that good old American right of appeal*. Do you question the propriety of having such appeal?

MR. PEACOCK. Not at all.

THE CHAIRMAN. But your question is to the form in which it is provided here?

MR. PEACOCK. That is the only objection—to the form. Having practiced law in Washington in Government matters for 15 years myself, *I feel that the regular legal processes offer practically all that is needed here*.

See also Hearings before the House Committee on Merchant Marine and Fisheries, on H. R. 7521, 74th Congress, 1st Session (1935), pages 383-384.

able under the shipping laws were, of course, prescribed by section 31 of the 1916 Act. Mr. Peacock's statements to both the Senate and the House Committees, and comments by the Senate Committee Chairman, reflect a clear understanding that even without express provision for judicial review—and even as to such matters as the determination of the size of subsidy payments, which by their nature are fraught with broad policy implications and as well involve an unusual degree of agency "expertise"—an interested party would have a right of judicial review to correct "abuse" of discretion. That the same "regular processes of law" would protect a company from unlawful agency action under a purely regulatory-type provision such as section 805(a) must be an *a fortiori* conclusion.

Subsequently in the 1935 hearings, a member of the House Committee on Merchant Marine and Fisheries briefly questioned the advisability of permitting judicial review with respect to subsidy adjustments¹⁴—but there is no indication of any decision by that committee or by Congress to preclude review even in that instance, much less of any intention to preclude review generally. On the contrary, while there was a difference of opinion during the Senate Committee hearings in 1936 as to the scope of judicial review with respect to subsidy adjustments, even the more restricted view would have permitted appeal to the courts in the event of "gross abuse of discretion".¹⁵

¹⁴ Hearings before House Committee on Merchant Marine and Fisheries on H. R. 7521, 74th Congress, 1st Session (1935), pages 701-702.

¹⁵ Hearings before the Senate Committee on Commerce on S. 3500, 74th Congress, 2d Session (1936), pages 115-117. At one point the Senate Committee Chairman challenged a witness advocating the narrower review, as follows:

THE CHAIRMAN. Just a moment on that matter. With our view of American government, is there any reason why an operator who felt that he had not had a fair deal and that the decision was not sufficient to give him parity, is there anything abusive in our opposition [sic] to our recognized system in America that he shall have an appeal to the courts? (p. 116.)

Thus, there is affirmative evidence both on the face of the statute and in its legislative history of Congress' intention to make orders under the 1936 Act judicially reviewable. But even had Congress remained silent on the question, the Supreme Court has held, since before the Administrative Procedure Act, that statutory silence as to judicial review does not preclude review. *Stark v. Wickard*, 321 U. S. 288 (1944). The House Judiciary Committee stated, in considering the Administrative Procedure Act:

"To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." (Legislative History of the Administrative Procedure Act, Senate Document 248, 79th Congress, 2d Session (1946), page 275).

Subsequently the Supreme Court has not only reaffirmed its holding in *Stark v. Wickard*, *supra*,¹⁶ but has also indicated that whatever was the scope of reviewability of administrative action prior to the Act, it has since been expanded,¹⁷ and that, "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed". *Marcello v. Bonds*, 349 U. S. 302, 310 (1955).

This Court also has emphatically reaffirmed the principle of judicial review as provided for in the Administrative Procedure Act:

"Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial re-

¹⁶ *Estep v. United States*, 327 U. S. 114 (1946); *Federal Reserve System v. Agnew*, 329 U. S. 441 (1947); *United States v. Interstate Commerce Commission*, 337 U. S. 426 (1949).

¹⁷ *Heikkila v. Barber*, 345 U. S. 229 (1953); *Shaughnessy v. Pedreiro*, 349 U. S. 48 (1955); *Brownell v. Tom We Skung*, 352 U. S. 182 (1956). And see *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924, 933, *cert. denied* 350 U. S. 884 (1955).

view would be completely immaterial. (Senate Document 248, *supra*, page 368. See also page 384.)' " *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F. 2d 685, 689 (D.C. Cir.), *cert. denied* 342 U. S. 849 (1951).

And in *Fleming v. Moberly Milk Products Co.*, 160 F. 2d 259, 265 (D. C. Cir.), *cert. dismissed* 331 U. S. 786 (1947), this Court declared:

"If the judiciary has no power in such matter, the only practical restraint would be the self-restraint of the executive branch. Such a result is foreign to our concept of the division of the powers of government."

D. The American President Lines Decision.

Reviewability of orders of the Federal Maritime Board under the Merchant Marine Act, 1936 was considered at length in *American President Lines, Ltd. v. Federal Maritime Board, et al.*, *supra*. The court held that while it would not substitute itself for the Board "within the ambit of matters committed to agency discretion", Board action was nevertheless judicially reviewable to be certain that statutory restrictions and procedures had not been transcended.¹⁸

In the *American President Lines* case, the court without comment rejected the Board's argument¹⁹ that since the 1936 Act expressly provided for review in four specialized circumstances,²⁰ its silence elsewhere indicated an

¹⁸ In its comments on judicial review under section 10 of the Administrative Procedure Act, the House Judiciary Committee stated, "In any case the existence of discretion does not prevent a person from bringing agency action but merely prevents him *pro tanto* from prevailing therein." Legislative History of the Administrative Procedure Act, Senate Document 248, 79th Congress, 2d Session, page 275. See *Homovich v. Chapman*, 191 F. 2d 761, 764 (D.C. Cir. 1951).

¹⁹ Its Memorandum of Points and Authorities in Support of Cross Motion for Summary Judgment, C. A. No. 13-53 (April 27, 1953), page 16.

²⁰ Section 402 (termination of ocean mail contracts under the Merchant Marine Act of 1928); section 611 (transfer of vessels to foreign registry, upon default by the Government under a subsidy contract); section 902 (just compensation for requisitioned vessels); section 1212 (relating to war-risk insurance).

intention to preclude review in all other cases. The Board's argument was clearly without merit, and properly rejected by the court, since in fact, as shown above, Congress was *not* silent on the subject. Moreover, the four situations in which express provision for review was made were unique and complicated, and in each instance Congress provided a specialized review procedure at variance with those available by the "regular processes of law" to which Mr. Peacock referred.²¹

It perhaps should be noted that in the memoranda filed in *American President Lines* it was argued that if the order there was reviewable, exclusive jurisdiction was vested in the Court of Appeals under the Review Act of 1950. Memorandum of Points and Authorities in Support of Motion of Defendant Pacific Far East Line, Inc., for Summary Judgment, C.A. No. 13-52 (May 8, 1953), page 2. The district court did not consider this argument in its opinion.

IV. ORDERS UNDER THE 1936 ACT ARE IN ANY EVENT "ENTERED UNDER AUTHORITY OF THE 1916 ACT"

There is additional evidence of Congressional intention. Section 23 of the 1916 Act originally provided that orders of the Shipping Board were to be effective for two years. In 1939, section 23 was amended to provide that,

"All orders of the United States Maritime Commission, other than for the payment of money, made under this Act, *as amended or supplemented*, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless

²¹ The Board in *American President Lines* relied on *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943), which, however, was decided prior to *Stark v. Wickard*, *supra*, and to the Administrative Procedure Act. It rested upon a clear mandate from Congress to preclude judicial review of explosive labor jurisdictional disputes, and has since been limited. *Steele v. Louisville & Nashville Ry. Co.*, 323 U.S. 192 (1944); *Order of Ry. Conductors v. Swan*, 329 U.S. 520 (1947); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). See also *Airline Dispatchers Ass'n v. National Mediation Board*, *supra*.

the same shall be suspended, or modified, or set aside by the Commission, *or be suspended or set aside by a court of competent jurisdiction.*"

Congress in 1939 clearly understood that section 23 applied to orders issued under the 1936 Act, since that act at a minimum was part of the 1916 Act as "supplemented". Thus, orders under the 1936 Act are entered under authority of section 23 of the 1916 Act and hence "under authority of the Shipping Act, 1916", as that term is employed in the Review Act of 1950.

Moreover, as amended, section 23 expressly recognizes that orders under the 1936 Act may be "suspended or set aside by a court of competent jurisdiction", i.e., that they are judicially reviewable. Finally, the term "orders" as used in section 31 of the 1916 Act is clearly synonymous with the term "orders" as used in section 23—there is not the slightest indication to the contrary. As section 23 embraces orders under the 1936 Act so too does section 31.

In conclusion, since the Review Act of 1950, at the Commission's own insistence, is applicable to *all* reviewable orders, and since, as has been clearly demonstrated, orders issued under the 1936 Act are reviewable, the Court should find that the order here is within this Court's jurisdiction under the Review Act of 1950.

V. RESPONDENTS' CONTENTION WOULD LEAD TO PROCEDURAL CHAOS

Procedural chaos would result from respondents' contention that no order entered under the 1936 Act could be reviewed under the Review Act of 1950:

A. The avowed purpose of the Review Act of 1950 would be frustrated in a major respect, and jurisdiction to review the orders of the Board and Administration would be arbitrarily divided between the Courts of Appeals and the various district courts. If it should be held that orders

under the 1936 Act are not judicially reviewable, petitioner and others similarly situated would have no redress whatever from unlawful agency orders under the 1936 Act.

B. In a recent rule-making proceeding under sections 15, 16, 17, and 21 of the 1916 Act (*inter alia*), the Board has held that its general rule-making power is derived from section 204 of the 1936 Act.²² If respondents should prevail, no order entered in a rule-making proceeding, even where relating to specific provisions of the 1916 Act, would be reviewable.

C. Section 205 of the 1936 Act is purely and simply a regulatory provision in *pari materia* with sections 14, 15, 16, 17 and 18 of the 1916 Act. If respondents' theory prevails, orders entered in proceedings under sections 14, 15, 16, 17 or 18 of the 1916 Act would be reviewable in the Courts of Appeals, while orders under section 205 in the same proceeding and dealing with the same subject matter apparently would either be reviewable only in the district courts or not reviewable at all.²³

The Review Act of 1950 was designed to avoid such incongruities, not to foster them.

CONCLUSION

The overwhelming import of all available evidence requires the conclusion that orders such as that of which review is here sought are judicially reviewable, and that Congress plainly intended, and provided, that review should

²² In the Matter of the Notice of Proposed Rule Making—Business Practices of Freight Forwarders (46 C.F.R. Part 244), Report of the Board on Petition to Dismiss, served August 21, 1957.

²³ That this is no mere academic possibility is illustrated by the recent Board decision in *Encinal Terminals v. Pacific Westbound Conference*, FMB Docket No. 790, report served June 28, 1957, where the complaint alleged violations of sections 14, 15, 16, 17 and 36 of the 1916 Act and section 205 of the 1936 Act. The Board found a violation of section 205 and accordingly held that it was "unnecessary" to consider the allegation under the other sections cited. In so doing, under the contentions it has advanced here and in the district court, it thereby precluded judicial review of its cease and desist order.

be in this Court. Respondents and intervener have wholly failed to prove the contrary, and their motions must be regarded as part of their overall attempt to deprive petitioner of its right to relief from improper agency action and to withhold that action from judicial review. The motions to dismiss should be denied.

Respectfully submitted,

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